TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 232.

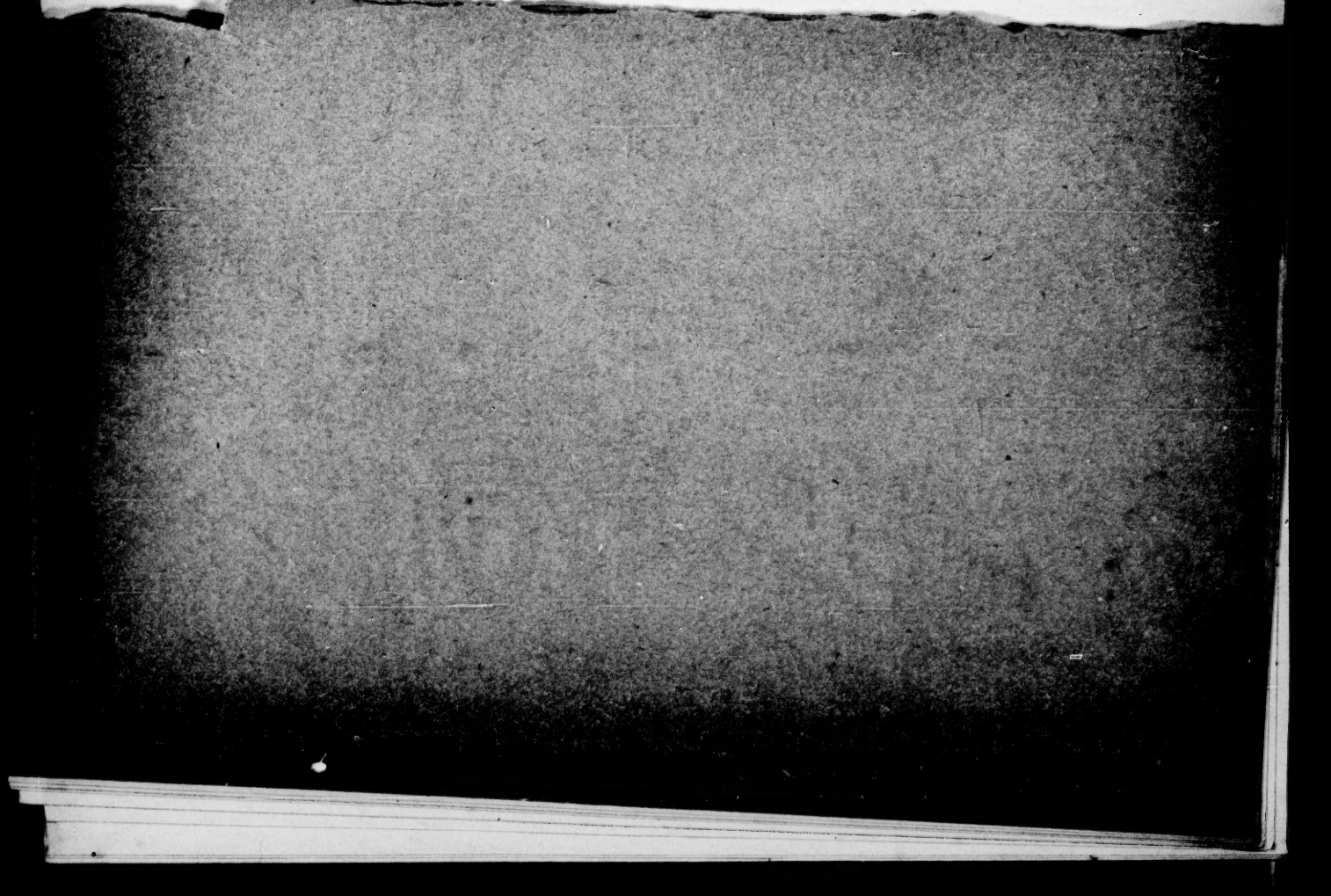
THE BELL TELEPHONE COMPANY OF MISSOURI, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI, EX REL: THE BALTIMORE AND OHIO TELEGRAPH COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED JUNE 1, 1885.



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1 *Transcript of Record.*

UNITED STATES OF AMERICA, *Eastern District of Missouri,* } *ss:*

In the Circuit Court of the United States in and for said District.

THE STATE OF MISSOURI at the Relation of THE BALTIMORE AND OHIO TELEGRAPH COMPANY, Relator,

against

THE BELL TELEPHONE COMPANY OF MISSOURI, Respondent.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Missouri, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the March term, 1885, thereof, between the State of Missouri *ex rel.* Baltimore and Ohio Telegraph Company, petitioner, and The Bell Telephone Company of Missouri, respondent, a manifest error hath happened, to the great damage of the said respondent, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this second day of April, in the year of our Lord one thousand eight hundred and eighty-five.

Issued at office, in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk Circuit Court United States, Eastern District of Missouri,
By —— ——, *Deputy.*

Allowed by—
DAVID J. BREWER,
Circuit Judge.

1—232

3 *Return to Writ.*

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office, in the city of St. Louis, this 3d day of April, A. D. 1885.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of said Court.

[Endorsed:] No. 2499. United States circuit court, eastern district of Missouri. State of Mo. *ex rel.* Baltimore & Ohio Telegraph Co. *vs.* Bell Telephone Co. of Mo. Writ of error to the circuit court of the U. S., eastern district of Missouri. Returned and filed 3d day of April, 1885. A. P. Selby, clerk.

4 The United States of America to the State of Missouri *ex rel.* Baltimore and Ohio Telegraph Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein The Bell Telephone Company of Missouri is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, judge of the circuit court of the United States for the eastern district of Missouri, this second day of April, in the year of our Lord one thousand eight hundred and eighty-five.

DAVID J. BREWER,
Judge United States Circuit Court, Eastern District of Missouri.

Due service of the above citation upon the said Baltimore and Ohio Telegraph Company, relator, this ninth day of April, A. D. 1885, is hereby acknowledged, and other or further notice and citation is waived.

GARLAND POLLARD,
Att'y for Relator.

5 [Endorsed:] No. 2499. United States circuit court, eastern district of Missouri. State of Missouri *ex rel.* Baltimore & Ohio Telegraph Co. *vs.* Bell Telephone Co. of Missouri. Citation. Filed April 3d, 1885. A. P. Selby, clerk.

6 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

In the Circuit Court of the United States in and for said District.
March Term, A. D. 1885.

Be it remembered that on the sixteenth day of March, A. D. 1885, being at a regular stated term of said court, the following, among other, proceedings were had and appear of record in the words and figures following, to wit:

Transcript Filed.

STATE OF MISSOURI *ex rel.* BALTIMORE AND OHIO TELEGRAPH CO., Plaintiff,
vs.
BELL TELEPHONE CO. OF MISSOURI, Defendant. } 2499.

Now comes defendant, by Hitchcock, Madill & Finkelnburg, its attorneys, and files transcript from the St. Louis circuit court and enters appearance; and thereupon comes the plaintiff, by Garland Pollard, its attorney, and files motion to remand this cause.

Said transcript is in words and figures following, to wit:

STATE OF MISSOURI, } ss:
City of St. Louis, }

Be it remembered that heretofore, to wit, *that* on the 24th day of February, 1885, there was filed in the office of the clerk of the circuit court a petition for mandamus, which is in the words and figures as follows, to wit:

Petition for Mandamus.

STATE OF MISSOURI, *City of St. Louis:*

In the Circuit Court of the City of St. Louis.

7 THE STATE OF MISSOURI upon the Relation of THE BALTIMORE AND OHIO TELEGRAPH COMPANY OF MISSOURI
vs.
THE BELL TELEPHONE COMPANY OF MISSOURI.

To the honorable judges of the circuit court of the city of St. Louis:

Your petitioner, The Baltimore and Ohio Telegraph Company, respectfully represents and shows that it is a corporation duly created, organized, and existing under and by virtue of the laws of the State of Missouri and in pursuance of article five (5) of chapter twenty-one (21) of the Revised Statutes of said State of 1879, entitled "Telegraph and telephone companies."

That the Bell Telephone Company of Missouri is a corporation created, organized, and existing under and by virtue of the laws of Missouri and in pursuance of said article five (5) of chapter twenty-one (21) of the Revised Statutes of 1879, entitled "Telegraph and telephone companies."

Petitioner avers that it is engaged in the business of transmitting for the public telegraphic dispatches between different points within the State of Missouri and through its connections with other States in the Union; that for the purposes aforesaid, for the convenience of the public and for the transaction of any private business appertaining to the petitioner, it had, prior to the grievances hereinafter stated, established and still has its general office or place of business at No. 205 North Third street in the city of St. Louis and State of Missouri.

And your petitioner avers that the said Bell Telephone Company has its principal office or place of business in said city of St.
8 Louis and was at the times hereinafter named and still is engaged in the business of transmitting for the public telephonic communications between its numerous and various patrons or subscribers in said city of St. Louis, and the manner in which the business of the said Bell Telephone Company is done is as follows, to wit:

The said telephone company has a system of telephonic wires extending into and through various streets and sections of said city of St. Louis, which said wires are connected by extensions, branch wires, or otherwise by the said telephone company, with the telephones which are furnished by it to its subscribers or patrons in the manner next hereinafter stated—that is to say: Whenever any party desires a telephone at any residence, office, or place of business within said city, upon application being made by such party to become a subscriber therefor, the said telephone is placed or located at such residence, office, or place of business by said telephone company as desired by the applicant as aforesaid, the same being done at the expense of the company and upon uniform rates and terms prescribed by it, and thereupon such subscriber acquires and becomes entitled to use said telephone, and to have and maintain, as occasion may require, verbal telephonic communication over the said system of wires of said telephone company with any other customer who may have acquired the right from said telephone company to use one of said telephones as aforesaid.

And your petitioner avers that said telephone company now has over twelve hundred subscribers or parties using its telephones in connection with its said system of wires, comprising various individuals, firms, and corporations residing or doing business in and about the said city of St. Louis, each of whom is enabled by the facilities afforded by the said telephone company as aforesaid to hold
9 telephonic communication as aforesaid with any other of the said subscribers, and the said telephone company furnishes each of its said subscribers with printed lists showing the name and residence and occupation of each of its subscribers, so that each subscriber may know the names and occupations of the various parties with whom his telephone may enable him to hold telephonic communication.

And petitioner avers that said telephone company has during the time hereinbefore stated and still does, through its authorized agents and officers, announce and hold itself in readiness, as it is by law

in duty bound to do, to furnish public telephonic facilities to all persons, firms, or corporations, including other telephone and telegraph companies, who may desire to become subscribers therefor in the manner above mentioned and without favoritism or discrimination, and has promptly furnished all applicants therefor who have complied with its said rates and terms with the said telephones and telephonic facilities except in the case of your petitioner.

And your petitioner further avers that heretofore, to wit, on the 27th day of January, 1885, and on divers other days since that time, it made application and demand to and upon the said telephone company for it to place one of its telephones in petitioner's office, at No. 205 North Third St. in said city of St. Louis, and for the telephonic facilities as aforesaid to be therewith connected, and your petitioner was then and there ready and offered and tendered and still is ready and offers and tenders the payment of the rates and the compliance with the rule as fixed by said telephone company for its other customers for the like service and facilities.

But the said telephone company, in contravention and violation of its charter obligations and of its duties to the public and to
10 petitioner, has refused to comply with your petitioner's application and demand made as aforesaid, and then and there refused and still does refuse to grant to this petitioner the use of a telephone or telephonic facilities applied for as aforesaid upon the ground and for the reason, as stated and alleged by said telephone company, that a certain bill, known as "House bill No. 245," is pending in the General Assembly of the State of Missouri providing for the placing of telephone and telegraph wires in certain cities in this State, including St. Louis, under ground.

And your petitioner avers that it is a matter of special importance and value to it for the convenient and economical conduct of its business that it should have and enjoy the right of telephonic communication as aforesaid with the said subscribers of said telephone company in the same manner and with the same privileges as are extended by said telephone company to its other subscribers, and that the said telephone and telephonic facilities applied for and demanded by this petitioner as aforesaid and refused by the said telephone company are valuable, though the exact amount that your petitioner has been or may be damaged by reason of the said refusal of said telephone company has and will be, by reason of the peculiar nature of said business, difficult and impossible to be precisely or definitely ascertained in an action therefor in a suit at law.

And your petitioner has no plain, speedy, or adequate remedy in the ordinary course of law for the wrong done to your petitioner as aforesaid or adequate remedy otherwise than by the awarding of the writ of mandamus herein prayed for.

And your petitioner avers that the business carried on and conducted by it in no way interferes or is in competition with that carried on and conducted by said telephone company as afore-
11 said, and that there is no valid reason why said telephone company may not furnish a telephone and telephonic facili

ties for petitioner's said office as readily, conveniently, and economically as has been done in the case of other of its said subscribers.

Wherefore, in view of the premises, your petitioner prays that this court will grant a writ of mandamus against the said Bell Telephone Company, requiring and commanding it and its officers and agents to place a telephone in the petitioner's said office, and to give and maintain for petitioner the same telephonic facilities given by said telephone company to its other subscribers, and to place petitioner's name on its list of subscribers distributed to its subscribers as aforesaid, all to be done by the said telephone company upon the same rates and terms as are or may be given to its other subscribers or to other telegraph companies and without discrimination against your petitioner; and your petitioner asks such other and further orders as may seem meet in view of the premises.

BALTIMORE AND OHIO TELEGRAPH COMPANY,
By GARLAND POLLARD, *Its Attorney.*

STATE OF MISSOURI, } ss:
City of St. Louis, }

Thomas F. Clohesey, having been duly sworn, makes oath and says that he is chief operator and acting manager of the said Baltimore and Ohio Telegraph Company in the city of St. Louis, Missouri, and that the statements contained in the foregoing petition are true in substance and in fact, to the best of his knowledge and belief.

THOMAS F. CLOHESEY.

Subscribed and sworn to before me this 23rd day of February, 1885.

[SEAL.]

CHAS. B. STARK,
Notary Public.

12 And afterwards, to wit, at a special term of said court, being the February term, 1885, thereof, the following further proceedings were had in said cause, to wit:

Writ of Mandamus Granted.

THE STATE OF MISSOURI *ex rel.* BALTIMORE AND OHIO TELEGRAPH CO.
vs.
THE BELL TELEPHONE COMPANY.

TUESDAY, *February 24th*, 1885.

Comes now the relator, by attorney, and presents the petition, and, on motion, it is ordered that an alternative writ of mandamus issue herein, returnable Saturday, February 28th, 1885, at ten a. m.; which writ of mandamus and return thereon are in words and figures following, to wit:

The State of Missouri to the Bell Telephone Company of Missouri, Greeting:

Whereas the State of Missouri, at the relation of the Baltimore and Ohio Telegraph Company of Missouri, has presented to our cir-

cuit court — city of St. Louis and State of Missouri a petition praying for a mandamus, which is in words and figures following, to wit:

Writ of Mandamus.

STATE OF MISSOURI, *City of St. Louis:*

In the Circuit Court of the City of St. Louis.

THE STATE OF MISSOURI upon the Relation of THE BALTIMORE AND OHIO TELEGRAPH COMPANY OF MISSOURI

vs.

THE BELL TELEPHONE COMPANY OF MISSOURI.

To the honorable judges of the circuit court of the city of St. Louis:

13 Your petitioner, The Baltimore and Ohio Telegraph Company, respectfully represents and shows that it is a corporation duly created, organized, and existing under and by virtue of the laws of the State of Missouri, and in pursuance of article five (5) of chapter twenty-one (21) of the Revised Statutes of said State of 1879, entitled "Telegraph and telephone companies."

Petitioner avers that it is engaged in the business of transmitting for the public telegraphic dispatches between different points within the State of Missouri, and through its connections with other States in the Union; that for the purposes aforesaid, for the convenience of the public, and for the transaction of any private business appertaining to the petitioner it had, prior to the grievances hereinafter stated, established and still has its general office or place of business at No. 205 North Third street, in the city of St. Louis, and State of Missouri.

And your petitioner avers that the said Bell Telephone Company has its principal office or place of business in said city of St. Louis, and was, at the times hereinafter named, and still is engaged in the business of transmitting for the public telephonic communications between its numerous and various patrons or subscribers in said city of St. Louis; and the manner in which the business of the Bell Telephone Company is done is as follows, to wit:

The said telephone company has a system of telephonic wires extending into and through various streets and sections of said city of St. Louis, which said wires are connected by extensions, branch wires, or otherwise by the said telephone company with the telephones

14 which are furnished by it to its subscribers or patrons in the manner next hereinafter stated—that is, to say, whenever any party desires a telephone at any residence, office, or place of business within said city, upon application being made by such party to become a subscriber therefor, the said telephone is placed or located at such residence, office, or place of business by said telephone company, as desired by the applicant as aforesaid, the same being done at the expense of the company, and upon uniform rates and terms prescribed by it; and thereupon such subscriber acquires and becomes entitled to use said telephone, and to have and main-

tain, as occasion may require, verbal telephonic communication over the said system of wires of said telephone company with any other customer who may have acquired the right from said telephone company to use one of said telephones as aforesaid.

And your petitioner avers that said telephone company now has over twelve hundred subscribers or parties using its telephones in connection with its said system of wires, comprising various individuals, firms, and corporations residing or doing business in and about the said city of St. Louis, each of whom is enabled, by the facilities afforded by the said telephone company as aforesaid, to hold telephonic communications, as aforesaid, with any other of the said subscribers.

And the said telephone company furnishes each of its said subscribers with printed lists showing the name and residence and occupation of each of its subscribers, so that such subscriber may know the names and occupations of the various parties with whom his telephone may enable him to hold telephonic communication.

And petitioner avers that said telephone company has during the time hereinbefore stated, and still does, through its authorized
15 agents and officers, announce and hold itself in readiness, as it is by law in duty bound to do, to furnish public telephone facilities to all persons, firms, or corporations, including other telephone and telegraph companies, who may desire to become subscribers therefor in the manner above mentioned, and without favoritism or discrimination, and has promptly furnished all applicants therefor who have complied with its said rates and terms with the said telephones and telephonic facilities except in the case of your petitioner.

And your petitioner further avers that heretofore, to wit, on the 27th day of January, 1885, and on divers other days since that time, it made application and demand to and upon the said telephone company for it to place one of its telephones in petitioner's office, at No. 205 North Third St., in said city of St. Louis, and for the telephonic facilities as aforesaid to be therewith connected, and your petitioner was then and there ready and offered and tendered, and still is ready and offers and tenders, the payment of the rates and the compliance with the rules as fixed by said telephone company for its other customers for the like service and facilities.

But the said telephone company, in contravention and violation of its charter obligations and of its duties to the public and to petitioner, has refused to comply with your petitioner's application and demand made as aforesaid, and then and there refused and still does refuse to grant to this petitioner the use of a telephone or telephonic facilities applied for as aforesaid upon the ground and for the reason, as stated and alleged by said telephone company, that a certain bill, known as " House bill No. 245," is pending in the General Assembly of the State of Missouri, providing for the placing of telephone and telegraph wires in certain cities in this State, including St. Louis, under ground.

16 And your petitioner avers that it is a matter of special importance and value to it for the convenient and economical

conduct of its business that it should have and enjoy the right to telephonic communication as aforesaid with the said subscribers of said telephone company in the same manner and with the same privileges as are extended by said telephone company to its other subscribers, and tnat the said telephone and telephonic facilities applied for and demanded by this petitioner as aforesaid and refused by the said telephone company are valuable, though the exact amount that your petitioner has been or may be damaged by reason of the said refusal of said telephone company has and will be, by reason of the peculiar nature of said business, difficult and impossible to be precisely or definitely ascertained in an action therefor in a suit at law.

And your petitioner has no plain, speedy, or adequate remedy in the ordinary course of law for the wrong done to your petitioner as aforesaid, or adequate remedy otherwise than by the awarding of the writ of mandamus herein prayed for.

And your petitioner avers that the business carried on and conducted by it in no way interferes or is in competition with that carried on and conducted by said telephone company as aforesaid, and that there is no valid reason why said telephone company may not furnish a telephone and telephonic facilities for petitioner's said office as readily, conveniently, and economically as has been done in the case of other of its said subscribers.

Wherefore, in view of the premises, your petitioner prays that this court will grant a writ of mandamus against the said Bell Telephone Company requiring and commanding it and its officers
17 and agents to place a telephone in the petitioner's said office, and to give and maintain for petitioner the same telephonic facilities given by said telephone company to its other subscribers, and to place petitioner's name on its list of subscribers distributed to its subscribers as aforesaid, all to be done by the said telephone company upon the same rates and terms as are or may be given to its other subscribers or to the other telegraph companies, and without discrimination against your petitioner.

And your petitioner asks such other and further orders as may seem meet in view of the premises.

BALTIMORE AND OHIO TELEGRAPH COMPANY,
By GARLAND POLLARD, *Its Att'y.*

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

Thomas F. Clohesey, having been duly sworn, makes oath and says that he is chief operator and acting manager of the said Baltimore and Ohio Telegraph Company in the city of St. Louis, Missouri, and that the statements contained in the foregoing petition are true in substance and in fact to the best of his knowledge and belief.

THOMAS F. CLOHESAY.

Subscribed and sworn to before me this 23rd day of February, 1885.

[SEAL.] CHAS. B. STARK,
Notary Public.

And whereas, upon consideration of said petition, it was ordered that an alternative writ of mandamus should issue as prayed:

These are, therefore, to command you to place a telephone in the petitioner's office and to give and maintain for petitioner
18 the same telephonic facilities given by said telephone company to its other subscribers, and to place petitioner's name on its list of subscribers distributed to its subscribers as aforesaid, all to be done by the said telephone company upon the same rates and terms as are or may be given to its other subscribers or to other telegraph companies and without discrimination against petitioner, as prayed for in the foregoing petition, or show cause before our said circuit court, in court-room number one (1), on Saturday, February 28th, 1885, at 10 o'clock a. m., why you will not do so.

Witness Chas. F. Vogel, clerk of our said court, with the seal thereof hereunto affixed, at office, in the city of St. Louis, this 24th day of February, A. D. 1885.

[SEAL.] CHAS. F. VOGEL, *Clerk.*

Upon which writ of mandamus the sheriff of the city of St. Louis made his return, as follows, to wit:

Sheriff's Return.

Executed this writ of mandamus in the city of St. Louis this 26th day of February, 1885, by delivering a copy of the same, as furnished by the clerk, to E. A. Smith, secretary of The Bell Telephone Company of Missouri, the within-named defendant, who was in the business office of said company and had charge thereof at the time of service. The president or any other higher chief officer could not be found in the city of St. Louis at the time of said service.

Fee, $1.00.

HENRY F. HARRINGTON, *Sheriff,*
By FRANK J. HAHN, *Deputy.*

And at the same term of said court the following further proceedings were had, to wit:

19 *Appearance of Respondent.*

STATE *ex rel.* BALTIMORE AND OHIO TELEGRAPH COMPANY
vs.
THE BELL TELEPHONE CO. } 66784.

SATURDAY, *February 28th*, 1885.

Comes now at this day the relator, by its attorney, and comes also the respondent, by its attorney, and said respondent enters its appearance herein and is given till 10 a. m. March 7th, 1885, in which to make return.

And on the 7th day of March, 1885, the return of respondent to alternative writ of mandamus was filed in words and figures as follows, to wit:

Return of Respondent. Mandamus.

STATE OF MISSOURI, *City of St Louis:*

In the Circuit Court City of St. Louis. February Term, 1885.

THE STATE OF MISSOURI upon the Relation of The Baltimore and Ohio Telegraph Company of Missouri
vs.
THE BELL TELEPHONE COMPANY OF MISSOURI.

Room 1.
Case No. 66784.

Now comes the Bell Telephone Company of Missouri, respondent above named, and for its return to the alternative writ of mandamus heretofore issued in the above-entitled cause the said respondent states and shows to the court—

That the said relator ought not to have its writ of peremptory mandamus prayed for by said relator for the reasons hereinafter stated.

Respondent admits that relator is a corporation engaged in business, as stated in said writ, and that this respondent is a cor-
20 poration organized under the laws of the State of Missouri, to wit, article 5 of chapter 21 of the Revised Statutes of 1879.

It is true that respondent has its principal office or place of business in the city of St. Louis, but it is not true that at the times in said writ stated respondent was or is, in any other manner than as hereinafter stated, engaged in transmitting for the public telephonic communications between its subscribers in said city of St. Louis or elsewhere; nor is it true that the business of respondent is done in the manner stated in said writ, but the said business is done in the manner hereinafter stated and not otherwise.

Respondent admits that it now has over twelve hundred subscribers or parties using telephones furnished by it, as hereinafter stated and not otherwise, in connection with a system of wires as hereinafter described and not otherwise; and that said subscribers comprise various individuals, firms, and corporations residing or doing business in and about the city of St. Louis, each of whom is enabled by the facilities so furnished, as hereinafter stated, by respondent and not otherwise to hold telephonic communication with any other of the said subscribers.

It is true that respondent furnishes each of its said subscribers with printed lists showing the names and occupation of each of its subscribers, so that each subscriber may know the names and occupations of the various parties with whom his telephone may enable him to hold telephonic communication.

Respondent says it is not true, as stated in said writ, that respondent has heretofore, through its authorized agents or officers, announced or held itself in readiness, or still does announce or hold itself in
21 readiness, to furnish public telephonic facilities, in the man-

ner in said writ mentioned, to all persons, firms, or corporations, including other telephone and telegraph companies, who may desire to become subscribers therefor in the manner mentioned in said writ, nor is it true that this respondent is by law or in duty bound so to do; nor that respondent has promptly furnished all applicants therefor who have complied with its rates and terms, as in said writ and petition stated, with the said telephones and telephonic facilities, except in the case of the relator.

Respondent admits that on the 27th day of January, A. D. 1885, the said relator made an application to this respondent for it, said respondent, to place one of its telephones in said relator's telegraph office, No. 205 North Third street, in the city of St. Louis; but said respondent states that said application was in writing and was made by said relator in and by a written communication addressed to this respondent, and not otherwise, of which said communication the following is a true and complete copy—that is to say:

"BALTIMORE AND OHIO TELEGRAPH COMPANY,
ST. LOUIS, *Jan'y 27th*, 1885.

To the Bell Telephone Company of Missouri:

The Baltimore and Ohio Telegraph Company desires to become a subscriber to and a member of your telephone system, and to that end hereby requests you to place one of your telephones in its telegraph office, at No. 205 North Third street, in this city, to furnish it with a list of your subscribers, and to put it in communication with such subscribers by means of said telephone, through your telephone exchange, on the same terms that similar telephonic facilities are furnished by you to other telegraph companies, with which terms this company is ready to comply.

22 THE BALTIMORE AND OHIO
TELEGRAPH COMPANY.
B. R. BATES, *Manager*."

Respondent further states that it is not true that it, the said respondent, in contravention or violation of its charter obligations or of its duties to the public or to said relator, has refused to comply with said relator's application and demand, nor is it true that respondent then and there refused or still refuses to grant to said relator the use of a telephone or telephonic facilities applied for as aforesaid upon the ground or for the reason, as alleged in said writ, that a certain bill, known as "House bill No. 245," was pending in the General Assembly of the State of Missouri providing for the placing of telephone and telegraph wires in certain cities of this State, including St. Louis, under ground.

Respondent states the fact to be that about the time when said letter of January 27th was received at respondent's office and for the greater part of the following two weeks the general manager of this respondent, to whom the executive management of its business is chiefly committed, was necessarily absent from the city of St. Louis in connection with respondent's business, for which reason said application did not receive prompt attention.

That on or about the 10th day of February, 1885, one Thomas F. Clohesey, who, as respondent is informed and believes, was then and there the authorized agent of relator in that behalf, called at respondent's office and had a conversation with respondent's said agent in reference to said application of January 27th, in which conversation this respondent's said agent requested said relator, through its agent aforesaid, to defer pressing its said application for telephonic facilities for the time being on the ground then
23 and there stated to said relator's agent in that behalf that there was pending in the General Assembly of the State of Missouri a bill such as mentioned in said petition, and that if said bill should become a law it might be construed to impose obligations on this respondent in respect of the further conduct and management of its business which might render it impossible for this respondent to further extend its said business or to supply telephonic facilities to other subscribers, and at the request of said Clohesey respondent, by its said agent in that behalf, made answer in writing to said application of relator, of date January 27th, 1885, substantially to the same effect as been verbally stated to him; a copy of which writing is in words and figures, to wit:

"*B. and O. Application for Exchange Service.*

In reply to yours of Jan. 27th:

THE BELL TELEPHONE COMPANY OF MISSOURI,
417 OLIVE STREET, ST. LOUIS, *February 10th*, 1885.

B. R. Bates, Esq., manager Baltimore and Ohio Tel. Co., St. Louis, Mo.

DEAR SIR: Enclosed please find copy of House bill No. 245, now pending at Jefferson City. This bill is on the calendar for engrossment, but at our urgent request was laid over.

In view of the possibility that this bill may become a law I have to suggest that your application for exchange service should be held in abeyance until the bill is finally disposed of.

We have no desire to unnecessarily delay action upon your
24 application, but as a matter of prudence feel justified in deferring all applications for service until we are relieved from the uncertainty of the present situation.

The Legislature will adjourn in about thirty days, when, if not before that time, we will respond to your application in a definite manner, as already indicated to your representative.

Yours truly,
(Signed) GEO. F. DURANT,
Gen'l M'g'r."

Respondent further states and avers the fact to be that at the time of and in said conversation last above mentioned this respondent, by its said authorized agent in that behalf, further stated to relator's said agent that if said relator would sign and present to said respondent an application in form and upon the terms and conditions such as were and are required to be signed by the subscribers to said respondent's telephonic exchange and upon the like terms and

conditions with other subscribers this respondent would not refuse to place a telephone in the office of said relator and furnish it with telephonic facilities, but upon the terms and conditions in said application contained (being the same terms and conditions which have been and are in all cases required of other subscribers to the telephonic exchange carried on by said respondent in the said city of St. Louis) would furnish the same to relator.

And respondent further states that at the time of said conversation and in connection with the statement so made for respondent as last above set forth respondent's agent then and there furnished to the said agent of the said relator a copy of an application for telephonic facilities such as was then and there mentioned as aforesaid,
which copy the said agent of relator then and there took away
25 with him for the purpose, as respondent's agent then and there understood, of considering the same.

And respondent avers that the said form of application of which a copy was so furnished to and then and there received and taken away by the said agent of said relator was in words and figures following—that is to say:

Form 79 A.

Subscription to Telephonic Exchange.

The Bell Telephone Company of Missouri.

Terms and conditions.—The instruments and lines on the subscriber's premises shall be carefully used and only as herein stated, all ordinary expense of maintenance and repair to be borne by the Bell Telephone Company of Missouri; he is to pay $10 for each telephone or call box destroyed otherwise than by unavoidabe accident and $25 per month in case of unauthorized removal or detention until its destruction or its loss without his fault is satisfactorily proved, but the payment shall not confer any title to the instrument or right to use it. In case communication is interrupted from any cause whatever the Bell Telephone Company of Missouri shall make all necessary repairs as expeditiously as possible, but shall not be liable for the consequences thereof.

For loss or damage that occurs in the course of employment of any messenger it shall not be liable beyond twenty times the charge made for such messenger service. The Bell Telephone Company of Missouri will remove the instruments from place to place during
the term within the territory covered by the exchange lines
26 upon request and payment of the expense thereof. Upon non-payment of any sum due or any use of the instruments on said premises improper or contrary hereto or any removal therefrom the Bell Telephone Company of Missouri may terminate the subscriber's rights by written notice served on him or any occupant of the premises and sever his connection and remove the instruments, and for this purpose and for inspection it and its servants may have access thereto.

The right of the subscriber is to use the instruments and connecting wires where the Bell Telephone Company of Missouri may place them under such rules as the Bell Telephone Company of Missouri may from time to time prescribe for the purpose of personal communication with the exchange and with parties whom the Bell Telephone Company of Missouri may connect with him for that purpose upon his and their business. They are not to be used for any toll or consideration to be paid by any person other than the subscriber, nor for performing any part of the work of collecting, transmitting, or delivering any message in respect of which any toll or consideration has been or is to be paid to any party other than the Bell Telephone Company of Missouri, nor for transmitting market quotations or news for sale, publication, or distribution, nor for calling messengers except from the central office or performing any other service in competition with service which the Bell Telephone Company of Missouri may undertake to perform. Said instruments are the property of the American Bell Telephone Company; are constructed and used under its patents, and are leased and licensed by it only for the uses above stated in consideration of a royalty and rental which it is to receive therefor, part of the payment named below, and which the Bell Telephone Company of Missouri is authorized to collect for a period not exceeding one year in advance; but
27 any use otherwise or without the payment of said rental or royalty is also an injury to and invasion of the said rights of the American Bell Telephone Company, entitling it to an injunction and other legal redress in a suit in its name and behalf and to the remedies by taking possession of instruments and lines and collecting rentals from the subscriber, as provided in the contract between the said company and said Bell Telephone Company of Missouri, and which the subscriber agrees to permit and to pay.

In view of the liability to errors in transmitting oral messages by telephone and the impossibility of fairly fixing the cause thereof the subscriber assumes all the risk or errors from misconnections or mistakes upon and by any telephone line and the officers and servants thereof in transmitting, receiving, or delivering messages; and in respect of any messages which may be sent or received by or for him over any other telephone or telegraph line no line shall be responsible for defaults occurring on any other line nor on its own lines, as specified in its usual contracts, nor for any damages unless the claim therefor be presented in writing within thirty days after sending the message and he makes the Bell Telephone Company of Missouri and every other line over which said message may pass his agent to receive the same to forward it towards destination at the rate for unrepeated messages, and for that purpose to bind him by the contracts on the usual blanks and make the message subject to the usual limitations, rules, and regulations, to which he hereby agrees, he will reimburse the Bell Telephone Company of Missouri for all tolls it may pay on such messages.

All the obligations hereof are binding on the subscriber until the instruments shall be redelivered to the Bell Telephone Com-

28 pany of Missouri or the American Bell Telephone Company or until, being bound and requested and having an opportunity to remove the same, they shall neglect to do so. All words herein referring to the subscriber shall be taken to be of such number and gender as the character of the subscriber may require.

The subscriber requests the Bell Telephone Company of Missouri to place in the premises, ——, one telephone, one transmitter, one call box, and switch and connect them for his use with the company's exchange for a term of one year, from ——, 188–, to ——, 188–, upon the terms and conditions stated above, which he hereby promises to keep and perform, and agrees to pay therefor to said company the sum of one hundred dollars per annum, payable semi-annually, in advance.

This request becomes a binding contract as soon as accepted by an executive officer of the Bell Telephone Company of Missouri by his signature hereto or by furnishing the instruments herein asked for. The terms of this contract cannot be varied nor waived by any representations or promises of any canvasser or other person unless the same be in writing and signed by the manager.

The subscriber acknowledges that he has received a duplicate hereof.

Signed at St. Louis, ——, 188–. Accepted by the Bell Telephone Company of Missouri.

And respondent avers the fact to be that the said form of application is in the form and contains the terms and conditions in accordance with and upon which, and not otherwise, this respondent has been in the habit of furnishing telephones and telephonic
29 facilities to its subscribers in said city of St. Louis, and that in and by the said offer so made for respondent as aforesaid to said relator's agent in that behalf, namely, that if said application were insisted on this respondent would furnish to said relator the telephonic facilities upon the terms and conditions in said form contained and set forth, this respondent did then and there without discrimination or favoritism offer to afford and furnish to said relator the like privileges which it has offered and afforded to its subscribers in general.

But this respondent further states that its said offer to furnish to said relator a telephone and telephonic facilities, to wit, upon the terms and conditions aforesaid, has never been accepted by relator, nor has said relator or any agent thereof at any time ever made application therefor to this respondent by signing or presenting an application in the form or upon the conditions hereinbefore set forth or equivalent thereto, but has hitherto failed and refused to avail itself of the said offer so made by respondent, or to become entitled by compliance therewith, or by accepting said conditions of telephonic facilities upon the like terms and conditions upon which the same are furnished to the subscribers of this respondent generally.

Respondent denies that it is a matter of special importance or value to relator, for the convenient and economical conduct of its business, that said relator should have or enjoy the right of tele-

phonic communication asked for by it, and denies that the said telephone and telephonic facilities applied for and demanded by said relator as alleged and as alleged refused by respondent are or would be valuable to relator, and denies that relator has been or may be damaged by reason of respondent's alleged refusal in any manner whatever.

30 Respondent also denies the allegation in said writ to the effect that the business carried on and conducted by said relator in no way interferes or is competitive with that carried on and conducted by respondent.

Respondent denies that it has in any respect failed or refused to fulfill any duty to said relator or has discriminated against said relator or has required or exacted of said relator any terms or conditions different from those which this respondent does and of right may require from its subscribers generally, and denies that by reason of any act or thing done or refused to be done by this respondent said relator is entitled to the relief by it prayed in this behalf.

And for a further return to said writ respondent states that on the 27th day of February, 1885, after service upon this respondent of the alternative writ issued by this honorable court in this behalf, but before the return day of said writ, this respondent renewed its said offer to relator above mentioned by addressing and delivering to said relator, by its agent duly authorized in that behalf, a further communication in respect of and in reply to its said application of January 27th, 1885, which communication was signed for this respondent by its vice-president and authorized agent in that behalf, and was in words and figures following:

"THE BELL TELEPHONE COMPANY
OF MISSOURI, 417 OLIVE STREET,
ST. LOUIS, *Feb. 27th*, 1885.

To the Baltimore and Ohio Telegraph Company, B. R. Bates manager, St. Louis, Mo.

31 DEAR SIR: Referring to your request that your office, No. 205 North 3rd street, St. Louis, be connected with our telephone exchange and that you be furnished with telephones for that purpose, we have to say that we are ready to make the connection for the purposes and upon the terms and conditions which are set forth in our regular form of exchange subscription, a copy of which is enclosed.

This form, as you will observe, prohibits the use of the instruments furnished for the transmission of messages for hire, or for doing any part of the work of collecting (transmitting or delivering telegraph messages), or for the performing of messenger or any other service which the exchange may undertake to perform.

We have not the right to furnish the instruments for any purpose other than those permitted by said form, which, as we have said, is our regular form.

Please inform us whether you desire the connection upon these terms and conditions.

Yours truly,

(S'g'd) GEO. F. DURANT,
Vice-President.

Respondent states that said letter of February 27th was also accompanied by a copy of the printed form or blank application hereinbefore mentioned and set forth, and which was in said letter referred to as accompanying the same; and for the contents, terms, and conditions thereof the respondent respectfully refers to the copy thereof hereinbefore set forth as "Form 79 A."

Respondent further states that four days after said communication of February 27th, above set forth, had been so addressed to and received by said relator, this respondent received from said
32 relator an answer in writing thereto, signed, as respondent is informed and believes, by the authorized agent of the relator in this behalf, and which answer is in words and figures following:

"BALTIMORE AND OHIO TELEGRAPH COMPANY,

ST. LOUIS, MO., 3—3, 1885.

Geo. F. Durant, Esq., vice-president Bell Telephone Company of Mo.

DEAR SIR: Yours of the 27th ult., with form of exchange subscription, has been received and considered.

The only condition in the form of subscription to which we see any objection is that which provides that "they (the instruments and wires) are not to be used for the performing any part of the work of collecting, transmitting, or delivering any message in respect of which any toll or consideration has been or is to be paid to any party other than the Bell Telephone Company of Missouri." If the toll or consideration referred to in this clause means toll or consideration for the work of collecting, transmitting, or delivering messages through the telephone the condition is unobjectionable, and we will sign the contract. But if the meaning is that messages which have passed or are to pass over the wires of this company, and for which this company has made or is to make a charge for the telegraphic service performed by it alone, cannot be received or delivered by this company through the telephone, no charge being made for or on account of such telephonic service, the condition is objectionable and this company cannot sign the contract with that provision in it.

Yours truly,

BALTIMORE AND OHIO TELEGRAPH COMPANY.
By BENN. R. BATES, *Manager.*

33 Respondent states that the said communication under date of March, 3rd, 1885, a copy of which is above set forth, is the only answer which respondent has received to said offer so made by respondent as aforesaid; and further states that it, said respondent,

is advised and therefore shows to the court that in and by its said communication last above set forth said relator has refused to accept or avail itself of the said offer of telephonic facilities so made to said relator by this respondent upon the terms and conditions aforesaid, being the same terms and conditions upon which telephones and telephonic facilities are by respondent supplied to its subscribers generally, and respondent submits to the court whether said relator ought further to have or maintain its said writ in this behalf.

And, for a further return in this behalf, respondent states and shows to the court that the several terms and conditions in said form of application contained, being the form required to be signed by the several subscribers to respondent's telephonic exchange, are not only reasonable, but necessary to be required and prescribed by this respondent for the proper and lawful conduct of its business for the reasons following:

Respondent states that all the electric-speaking telephones heretofore and now in use by it in the manner hereinafter stated are the property of the American Bell Telephone Company, a corporation organized under the laws of the Commonwealth of Massachusetts; that said last-named corporation owns certain letters patent of the United Stated granted to Alexander Graham Bell under date of March 7th, 1876, and January 30th, 1877, numbered, respectively, 174,465 and 186,787; that said electric-speaking telephones are all constructed under and covered by said letters patent; that
34 respondent has acquired the right as lessee and licensee of said instruments to use the same by contracts of license and lease from said American Bell Telephone Company, nor has this respondent any lawful right to use said telephones or to permit others to use the same except under said license and in virtue of and in accordance with the patent laws of the United States touching useful inventions.

Respondent further states that the contracts with said American Bell Telephone Company, under and by virtue whereof, and not otherwise, this respondent has the lawful right to use and supply to others for use any of the telephones above mentioned, provides, among other things, as follows:

"For the purpose of this contract a telephonic exchange system means a system entirely within said territory, in which different circuits are connected with a central or branch office of the exchange, attended by an agent of the exchange, for the purpose of placing subscribers or other parties by such circuits in telephonic communication with such central or branch exchange office or with each other, either directly or through the agents of the system. No office or line of an exchange can be connected with any point outside of said territory, nor with any telegraph company's office or line, except by lines of the licensor or parties specially designated by it for this purpose, and no telegraph company unless specially permitted by the licensor can be a subscriber or use the system to collect or deliver messages from it to its customers. * * *

"That no person engaged in the business of transmitting mes-

sages for other parties shall be authorized or knowingly allowed by the exchange to transmit such messages over such lines."

35 Respondent further states that by and under said contract of lease and license said American Bell Telephone Company, the owner as aforesaid of said patents covering said instruments, reserves to itself exclusively the use thereof for collecting, transmitting, and delivering all messages for electrical transmission to or from points outside of the territory named in its said contract with the respondent, to wit, the city of St. Louis and other territory in said contract specified.

Respondent further states that under and pursuant to said contracts of lease and license, and as the conditions upon which such license was granted to this respondent, said American Bell Telephone Company has prescribed the form of contract to be made for the use of said instruments between respondent and its subscribers, being the same form in this return above set forth as "Form 79 A," and upon the conditions prescribed in which form this respondent, as hereinbefore stated, has already offered to supply said relator with a telephone and telephonic facilities, but which said relator has refused as aforesaid to accept.

That said form of contract so prescribed by said American Bell Telephone Company, among other things, provides that said instruments and connecting wires shall not be used "for performing any part of the work of collecting, transmitting, or delivering any message in respect of which any toll or consideration has been or is to be paid to any party other than the exchange," to wit, this respondent, "nor for transmitting market quotations or news for sale, publication, or distribution, nor for calling messengers, except from the central office, or performing any other service in competition with service which the exchange may undertake to perform."

36 And said form of contract prescribed by said American Bell Telephone Company further limits "the right to the subscriber to use the instruments and connecting wires * * * for the purpose of personal communication with the exchange and with parties whom the exchange may connect with him for that purpose upon his and their business."

Respondent further states that under and pursuant to said contract of lease and license respondent has established and is operating telephonic exchanges in the city of St. Louis and elsewhere within the territory mentioned in said contract, which, as its said exchange in said city of St. Louis, *which* it conducts in the manner following, to wit:

It has a central office in the said city of St. Louis. It places one of the electric-speaking telephones leased from the American Bell Telephone Company under its said contract in the office or residence of its subscriber and connects said instrument by a special wire with said central office. This wire, when direction is given over a second wire hereinafter mentioned, is connected at said central office with a like special wire of any other subscriber with whom the subscriber first mentioned desires to have communication and so remains in such connection until direction over the second or

call-wire is given to sever such connection. Said second or call-wire is common to a large number of subscribers upon the same circuit, but said first-mentioned wire is a special and distinct wire connecting said central office with each instrument leased and used as aforesaid, or, in some cases, said call-wire is dispensed with and the other connecting the wires is made over the special wire. Each one of said instruments is the property of said American Bell Telephone Company, constructed and used under its patents aforesaid
37 and leased and licensed by it to respondent for the uses stated in said contract, in consideration of a royalty and rental which respondent is authorized and undertakes to collect from its subscribers and account for to said American Bell Telephone Company.

Respondent is advised and therefore states and shows to the court that under the terms of its said contract with said American Bell Telephone Company and of its said license from said last-mentioned company under said patents above mentioned it would be a violation as well of its said contract and license aforesaid as of the patent laws of the United States in such case made and provided for this respondent to permit the relator, which is a telegraph company, to become a subscriber to the telephonic exchange conducted by this respondent, unless especially permitted by said American Bell Telephone Company, licensor; but that this respondent has obtained permission from said licensor to accept said relator as a subscriber, provided and upon condition that said relator should accept the said conditions so prescribed as aforesaid by said American Bell Telephone Company as such licensor under said patents, and should contract for such telephone and telephonic facilities upon the conditions and in the form hereinbefore stated and not otherwise.

The respondent is advised and therefore states and shows to the court that under and by virtue of the laws of the United States securing to inventors the benefits of new and useful inventions by letters patent, granting to them and their assigns the exclusive right to make, vend, and use the same, and authorizing such patentees to assign and transfer to other persons upon such conditions as they may prescribe the rights and privileges secured under such
38 letters patent, it is not lawful for any person to make, vend, or use or permit to be used any invention secured by letters patent of the United States, except with the consent of and upon the terms and conditions prescribed by the patentees of such inventions or their assigns, and that under and in virtue of the said laws of the United States touching patents for useful inventions it would be unlawful for this respondent, under the circumstances above stated, to contract with said relator for or to furnish unto said relator the use of a telephone and telephonic facilities such as in said writ and petition mentioned, except upon the terms and conditions so prescribed by said American Bell Telephone — in that behalf.

Wherefore this respondent says that in and by its said offer heretofore made to said relator as hereinbefore stated, to furnish to said relator a telephone and telephonic facilities such as are enjoyed by other subscribers of the respondent, but upon the terms and condi-

tions nevertheless contained in said form of contract hereinbefore set forth and not otherwise, this respondent has fulfilled its own duties as licensee of said American Bell Telephone Company, and has only insisted upon a compliance by said relator with the requirements of the laws of the United States in that behalf.

And, having fully answered, said respondent prays judgment that said relator take nothing by its writ and for costs.

HITCHCOCK, MADILL & FINKELNBURG,
Attorneys for Respondent, with Whom is E. T. Allen.

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

George F. Durant, undersigned, being first duly sworn, on
39 his oath states that he is the vice-president and general manager of the Bell Telephone Company of Missouri, named as respondent in the foregoing return; that affiant had read the said foregoing return and knows the contents thereof, and that the matters therein stated are true, except as to matters stated upon information and belief, and as to those matters he believes them to be true.

GEO. F. DURANT.

Subscribed and sworn to at said city of St. Louis this 5th day of March, A. D. 1885, before me, the undersigned, a notary public within and for said city of St. Louis and State of Missouri, duly commissioned and qualified and acting for a term to expire on the 28th day of June, A. D. 1885.

[SEAL.] EDWARD S. ROBERT,
Notary Public within and for said City of St. Louis, Missouri.

And at the same term of said court the following further proceedings were had in said cause, to wit:

Motion for Peremptory Writ Filed.

STATE OF MISSOURI *ex rel.* BALTIMORE AND OHIO TELEGRAPH COMPANY
vs.
BELL TELEPHONE COMPANY. } 66784.

MONDAY, *March 9th*, 1885.

Motion for peremptory writ notwithstanding return filed.

Which motion for peremptory writ is in the words and figures following, to wit:

Motion for Peremptory Writ.

In the Circuit Court, City of St. Louis, State of Missouri.

THE STATE OF MISSOURI upon the Relation of THE BALTIMORE & OHIO TELEGRAPH COMPANY OF MISSOURI

vs.

THE BELL TELEPHONE COMPANY OF MISSOURI.

Mandamus.

40 And now comes the relator, The Baltimore and Ohio Telegraph Company, and moves the court to award and issue a peremptory writ of mandamus against respondent, as prayed for in its petition, notwithstanding the return of said respondent, because—

1. The return does not show cause why the peremptory writ should not issue; and

2. The facts stated and admitted show that on the face of the pleadings relator is entitled to the writ.

GARLAND POLLARD,
Att'y for Relator.

And at the same term of said court the following further proceedings were had in said cause, to wit:

Order of Removal to U. S. Circuit Court.

THE STATE OF MISSOURI *ex. rel* BALTIMORE AND OHIO TELEGRAPH COMPANY OF MISSOURI

vs.

THE BELL TELEGRAPH COMPANY OF MISSOURI.

FRIDAY, *March 13th*, 1885.

On motion of defendant, by attorney, this day filed, it is ordered by the court that, upon defendant giving bond in the sum of $500, to be approved by the court, that the clerk of this court forthwith certify to the circuit court of the United States for the eastern district of Missouri a full, true, and complete copy of the record and proceedings is this cause as fully as the same appear of record in this office. Bond approved and filed.

Which petition for removal and bond are in the words and figures following, to wit:

41 *Petition for Removal of Cause.*

STATE OF MISSOURI, } ss:
City of St. Louis, }

In the Circuit Court, City of St. Louis. February Term, 1885.

THE STATE OF MISSOURI at the Relation of The Baltimore and Ohio Telegraph Company of Missouri
vs.
THE BELL TELEPHONE COMPANY OF MISSOURI.

Case No. 66784.
Room No. 1.

To the honorable the said circuit court, city of St Louis:

Your petitioner, The Bell Telephone Company of Missouri, respectfully represents that it is the respondent in the above-entitled cause, and that said cause was commenced on or about the 24th day of February, 1885, in this court, to wit, at and during the present February term, 1885, of this court, by the issue of an alternative writ of mandamus addressed to this respondent.

That your petitioner was at the time of bringing said suit and still is a corporation under the laws of the State of Missouri and a citizen of said State.

That the matter in dispute in said suit exceeds, exclusive of costs, the sum or value of $500, and arises under the laws of the United States.

Your petitioner further shows that in and by the said alternative writ of mandamus the said respondent, petitioner herein, was required to show cause why it should not place a telephone in the office of the Baltimore and Ohio Telegraph Company of Missouri, relator in said cause, and give and maintain for said telegraph company, relator, the same telephonic facilities given by your respondent to its other subscribers, and to place said telegraph company's, relator's, name on its list of subscribers; all to be done by this respondent upon the same rates and terms as are or may be given to its other subscribers or to other telegraph companies and without discrimi-

42 nation against said Baltimore and Ohio Telegraph Company.

Your petitioner further shows that on the 7th day of March, A. D. 1885, to wit, at the said present February term, 1885, of this court, it, said respondent, filed its return to said alternative writ, setting forth, among other things, that this respondent had offered and was willing to supply *to* said relator with a telephone and telephonic facilities such as mentioned in said alternative writ upon certain conditions in said return stated, but that said relator had refused to accept or comply with said conditions.

And by this repondent's said return to said writ it further appears and is averred that under and by reason of the terms of a certain contract between this respondent and the American Bell Telephone

Company, and of a certain license from said last-mentioned company to this respondent, granted and issued by said American Bell Telephone Company under and in pursuance of the laws of the United States concerning useful inventions and patents therefor, it would be a violation as well of its said contract and license aforesaid as of the patent laws of the United States in such case made and provided, for this respondent to permit the said Baltimore and Ohio Telegraph Company of Missouri, relator, to become a subscriber to the telephonic exchange conducted by this respondent, or to furnish to said relator a telephone and telephonic facilities as required by said writ, except upon the conditions in said return stated, and which conditions said relator refused to accept.

Your petitioner further states that the said relator has filed its motion in this cause praying this court to issue the peremptory writ of mandamus by said relator prayed for against this respond-
43 ent notwithstanding the said return and the matters aforesaid therein averred.

And your petitioner further shows and states to the court that the defense set up in this cause by this respondent is based and the correct decision of this cause depends upon the proper construction of the patent laws of the United States aforesaid.

Your petitioner further shows that said cause has not been tried but is now pending for trial in the said circuit court, city of St. Louis, at the same term in and during which said cause was brought, to wit, the said February term, 1885, of said court; and that your petitioner desires to remove said cause into the circuit court of the United States for the eastern district of Missouri in pursuance of the statute in that behalf provided, to wit, in pursuance of the provisions of the second section of the act of Congress approved March 3, 1875.

Your petitioner further shows that it has filed herewith a bond, with good and sufficient sureties, in the sum of $500, conditioned that the respondent shall enter in the circuit court of the United States for the eastern district of Missouri, within the district where said suit is pending, on the 1st day of the next session of said court, a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, as provided by the statute of the United States in that behalf.

Wherefore this respondent prays this honorable court that said bond may be approved and said suit be removed into the circuit court of the United States for the eastern district of Missouri, and that this court proceed no further in the premises.

For the Bell Telephone Company of Missouri, respondent—

E. A. HITCHCOCK, *President.*

44 STATE OF MISSOURI, } ss:
City of St. Louis, }

Ethan A. Hitchcock, undersigned, being duly sworn, states that he is the President of the Bell Telephone Company of Missouri,

petitioner above named and respondent in the above-entitled cause; that affiant has read the foregoing petition and knows the contents thereof, and that the matters stated in said petition are true as affiant verily believes.

E. A. HITCHCOCK.

Subscribed and sworn to by said Ethan A. Hitchcock, at St. Louis, Missouri, on this 12th day of March, A. D. 1885, before me, the undersigned, a notary public within and for said city of St. Louis and State of Missouri, duly commissioned, qualified, and acting as such (for a term to expire on the 27th day of June, A. D. 1885). As witness my hand and official seal as such notary public at St. Louis aforesaid, the day and year above written.

[SEAL.] JOHN C. H. STEVENSON,
Notary Public within and for the City of St. Louis, Missouri.

Bond.

In the Circuit Court, City of St. Louis. February Term, 1885.

STATE OF MISSOURI on the Relation of THE BALTIMORE AND OHIO TELEGRAPH COMPANY
vs.
THE BELL TELEPHONE COMPANY OF MISSOURI.
Case No. 66784.
Room No. 1.

Bond on removal of cause.

Know all men by these presents that we, The Bell Telephone Company of Missouri, as principal, and William A. Hargadine, of the city of St. Louis, Missouri, as surety, undersigned, are jointly and severally held and firmly bound unto the Baltimore and Ohio Telegraph Company of Missouri in the penal sum of five hun-
45 dred dollars; for which sum, well and truly to be paid unto the said Baltimore and Ohio Telegraph Company of Missouri, its successors and assigns, we bind ourselves, our successors, heirs, executors, administrators, and assigns, firmly by these presents.

Sealed with our seals and dated this twelfth day of March, A. D. 1885.

The condition of this obligation is such that if the said Bell Telephone Company of Missouri, defendant in the above-entitled suit now pending in the circuit court, city of St. Louis, shall, on the first day of the next session or term of the circuit court of the United States for the eastern district of Missouri, enter in said circuit court a copy of the record in the said above-entitled suit and shall enter the appearance of the said Bell Telephone Company of Missouri in said circuit court of the United States, and shall therein appear and enter special bail in such suit, if special bail was originally requisite therein, and shall pay all costs that may be awarded by the said circuit court of the United States if said court shall hold that such suit was wrongfully or improperly removed thereto from said circuit court, city of St. Louis, then this obligation to be void; otherwise to remain in full force and effect.

In witness whereof the said obligors have hereunto set their hands and seals, at said city of St. Louis, this twelfth day of March, A. D. 1885, the said Bell Telephone Company of Missouri executing those presents by the president thereof, duly authorized under the common seal of said corporation, attested by its secretary.

For the Bell Telephone Company of Missouri:

[SEAL.] E. A. HITCHCOCK, *President.*
WM. A. HARGADINE. [SEAL.]

Attest: E. A. SMITH, *Sec'y.*

Clerk's Certificate.

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

46 I, Charles F. Vogel, clerk of the circuit court, city of St. Louis, do hereby certify the foregoing to be a true, full, and complete transcript of the record and proceedings in the above-entitled cause as fully as the same remain on file and of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office, in the city of St. Louis, this 16th day of March, A. D. 1885.

[SEAL.] CHAS. F. VOGEL, *Clerk.*

47 And afterwards, to wit, on the 16th day of March, A. D. 1885, the following motion to remand was filed in said cause, to wit:

Motion to Remand.

THE STATE OF MISSOURI upon the Relation of THE BALTIMORE AND OHIO TELEGRAPH COMPANY OF MISSOURI, Plaintiff,

vs.

THE BELL TELEPHONE COMPANY OF MISSOURI, Defendant.

And now comes the plaintiff and moves the court to remand said cause to the State court for the reasons following:

1. This court has no jurisdiction over said cause.
2. The State of Missouri is a party.
3. It does not appear that the amount in controversy exceeds the sum of five hundred dollars or that the subject-matter of the suit is property or any right the value of which in money is susceptible of judicial ascertainment.
4. It does not appear, either from the petition of removal or from the record, that the cause involves any question arising under the Constitution or laws of the United States or how such question will arise.

GARLAND POLLARD,
Att'y for Plaintiff.

And afterwards, to wit, on the 18th day of March, A. D. 1885, the following further proceedings were had and appear of record in said court, to wit:

Motion to Remand Withdrawn.

STATE OF MISSOURI *ex rel.* BALTIMORE & OHIO TELEGRAPH COMPANY, Plaintiff,
vs.
BELL TELEPHONE CO. OF MO., Defendant. } 2499.

Now comes the plaintiff, by attorney, and by leave of court withdraws the motion to remand heretofore filed.

48 And afterwards, to wit, on the 28th day of March, A. D. 1885, the following further proceedings were had in said cause and appear of record in words and figures following, to wit:

Peremptory Writ of Mandamus Granted.

STATE OF MISSOURI *ex rel.* BALTIMORE AND OHIO TELEGRAPH COMPANY OF MISSOURI, Plaintiff,
vs.
BELL TELEPHONE COMPANY OF MISSOURI, Defendant. } 2499.

Now come the parties, by their respective attorneys, the petitioner by Garland Pollard and the respondent by Edmund T. Allen, and the court having considered the application of petitioner for a mandamus against respondent to place a telephone in petitioner's office, and being fully advised in the premises, orders that the said application be sustained, and that a peremptory writ of mandamus issue herein, to be directed to the said respondent, The Bell Telephone Company of Missouri, commanding it and its officers and agents to place a telephone in petitioner's office or place of business, at number 205 North Third street, in the city of St. Louis, Missouri, and to give and maintain for said petitioner the same telephonic facilities given by said telephone company to its other subscribers, and
49 to place petitioner's name on its list of subscribers distributed to its subscribers as aforesaid; all to be done by the said respondent upon the same rates and terms as are or may be given to its other subscribers or to other telegraph companies and without discrimination against said petitioner, and that they certify perfect obedience to said writ to this court on the first day of the next term thereof, on the third Monday in September next.

And afterwards, to wit, on the 3rd day of April, A. D. 1885, the following further proceedings were had and appear of record in words and figures as follows, to wit:

Writ of Error and Citation Filed. Writ of Error Allowed and Citation Signed.

STATE OF MISSOURI *ex rel.* BALTIMORE AND OHIO TELEGRAPH COMPANY, Plaintiff,
vs.
BELL TELEPHONE COMPANY OF MISSOURI, Defendant. } 2499.

Now comes the defendant, by attorney, and presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonishing the said plaintiff to be and appear at said Supreme Court at the next term thereof, to be begun and held at Washington, D. C., on the second Monday of October next; which said writ of error is allowed and said citation signed by the judge.

And afterwards, to wit, on the 11th day of April, A. D. 1885, the following further proceedings were had in said cause and appear of record in words and figures as follows, to wit:

50 *Bond Filed and Approved.*

STATE OF MISSOURI *ex rel.* BALTIMORE AND OHIO TELEGRAPH CO., Plaintiff,
vs.
BELL TELEPHONE COMPANY OF MISSOURI, Defendant. } 2499.

Now comes the defendant, by attorney, and presents to the court its bond in the penal sum of twelve thousand dollars, which bond is approved and ordered to be filed; and thereupon, on motion, it is ordered that a supersedeas be awarded staying further proceedings on the mandamus herein.

Said bond is in the words and figures following, to wit:

51 *Bond.*

Know all men by these presents that we, The Bell Telephone Company of Missouri, as principal, and William A. Hargadine and Edwards Whittaker, as sureties, are held and firmly bound unto Baltimore and Ohio Telegraph Company of Missouri in the full and just sum of twelve thousand dollars, to be paid to the said Baltimore and Ohio Telegraph Company, its heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this tenth day of April, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately at the March term, A. D. 1885, of the circuit court of the United States for the eastern district of Missouri, in a suit

depending in said court between the State of Missouri *ex rel.* Baltimore and Ohio Telegraph Company of Missouri, plaintiff, and The Bell Telephone Company of Missouri, defendant, judgment was rendered against the said defendant; and the said defendant having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said plaintiff, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said defendant shall prosecute said writ to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

[Seal of Bell Telephone Company of Missouri.]

Sealed and delivered in the presence of—

THE BELL TELEPHONE CO.
OF MISSOURI,

(Signed) By E. A. HITCHCOCK. [SEAL.]
(Signed) WM. A. HARGADINE. [SEAL.]
(Signed) EDWARDS WHITAKER. [SEAL.]

Attest: E. A. SMITH, *Sec'y.*

Approved by—
(Signed) DAVID J. BREWER,
Circuit Judge.

52 [Endorsed:] No. 2499. United States circuit court, eastern district of Missouri. State of Missouri *ex* relation Baltimore & Ohio Telegraph Company of Missouri *vs.* Bell Telephone Company of Missouri. Bond, $12,000. Bell Telephone Co. of Mo., principal; William A. Hargadine, Edwards Whittaker, sureties. Filed 11th day of April, 1885. A. P. Selby, clerk. O K. Garland Pollard, att'y for relator.

53 And afterwards, to wit, on the 17th day of April, A. D. 1885, the following further proceedings were had in said cause and appear of record in the words and figures following, to wit:

Certificate of Division Filed.

STATE OF MISSOURI *ex rel.* BALTIMORE & OHIO TELEGRAPH Co., Relator,
vs.
BELL TELEPHONE CO. OF MISSOURI, Respondent. } 2499.

A certificate of division is this day filed herein.

Said certificate of division is in the words and figures following, to wit:

54 *Certificate of Division.*

UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

At a circuit court of the United States begun and held at the city of St. Louis, Missouri, in and for the eastern district of Missouri, on the 16th day of March, in the year of our Lord eighteen hundred and eighty-five, to wit, at the March term, A. D. 1885, of said circuit court.

Present: The Honorable David J. Brewer, circuit judge, and the Honorable Samuel Treat, district judge.

STATE OF MISSOURI at the Relation of THE BALTIMORE & OHIO TELEGRAPH COMPANY OF MISSOURI
vs.
THE BELL TELEPHONE COMPANY OF MISSOURI. } No. 2499.

This was a proceeding for a writ of mandamus in favor of The Baltimore & Ohio Telegraph Company of Missouri, relator, against The Bell Telephone Company of Missouri, respondent, originally instituted in the circuit court, city of St. Louis, and removed, on petition of said respondent, to the circuit court of the United States.

The petition filed by said relator in the said circuit court, city of St. Louis, was in the words and figures following:

Petition for Mandamus.

STATE OF MISSOURI, *City of St. Louis:*

In the Circuit Court of the City of St. Louis.

55 THE STATE OF MISSOURI upon the Relation of the BALTIMORE AND OHIO TELEGRAPH COMPANY OF MISSOURI
vs.
THE BELL TELEPHONE COMPANY OF MISSOURI.

To the honorable judges of the circuit court of the city of St. Louis:

Your petitioner, The Baltimore and Ohio Telegraph Company, respectfully represents and shows that it is a corporation duly created, organized and existing under and by virtue of the laws of State of Missouri and in pursuance of article five (5) of chapter twenty-one (21) of the Revised Statutes of said State of 1879, entitled "Telegraph and telephone companies."

That the Bell Telephone Company of Missouri is a corporation created, organized, and existing under and by virtue of the laws of Missouri and in pursuance of said article five (5) of chapter twenty-one (21) of the Revised Statutes of 1879, entitled "Telegraph and telephone companies."

Petitioner avers that it is engaged in the business of transmitting for the public telegraphic dispatches between different points

within the State of Missouri, and through its connections with other States in the Union; that for the purposes aforesaid, for the convenience of the public, and for the transaction of any private business appertaining to the petitioner, it had, prior to the grievances hereinafter stated, established and still has its general office or place of business at No. 205 North Third street, in the city of St. Louis and State of Missouri.

And your petitioner avers that the said Bell Telephone Company has its principal office or place of business in said city of St.
56 Louis and was, at the times hereinafter named, and still is engaged in the business of transmitting for the public telephonic communications between its numerous and various patrons or subscribers in said city of St. Louis; and the manner in which the business of the said Bell Telephone Company is done, is as follows, to wit:

The said telephone company has a system of telephonic wires extending into and through various streets and sections of said city of St. Louis, which said wires are connected by extensions, branch wires, or otherwise, by the said telephone company, with the telephones which are furnished by it to its subscribers or patrons in the manner next hereinafter stated—that is to say, whenever any party desires a telephone at any residence, office, or place of business within said city, upon application being made by such party to become a subscriber therefor, the said telephone is placed or located at such residence, office, or place of business by said telephone company as desired by the applicant as aforesaid, the same being done at the expense of the company and upon uniform rates and terms prescribed by it; and thereupon such subscriber acquires and becomes entitled to use said telephone and to have and maintain, as occasion may require, verbal telephonic communication over the said system of wires of said telephone company with any other customer who may have acquired the right from said telephone company to use one of said telephones as aforesaid.

And your petitioner avers that said telephone company now has over twelve hundred subscribers or parties using its telephones in connection with its said system of wires, comprising various individuals, firms, and corporations residing or doing business in and about the said city of St. Louis, each of whom is enabled, by the facilities afforded by the said telephone company as afore-
57 said, to hold telephonic communication as aforesaid with any other of the said subscribers; and the said telephone company furnishes each of its said subscribers with printed lists showing the name and residence and occupation of each of its subscribers, so that each subscriber may know the names and occupations of the various parties with whom his telephone may enable him to hold telephonic communication.

And petitioner avers that said telephone company has, during the time hereinbefore stated and still does, through its authorized agents and officers, announce and hold itself in readiness, as it is by law in duty bound to do, to furnish public telephonic facilities to all persons, firms, or corporations, including other telephone and telegraph

companies, who may desire to become subscribers therefor in the manner above mentioned and without favoritism or discrimination, and has promptly furnished all applicants therefor who have complied with its said rates and terms with the said telephones and telephonic facilities, except in the case of your petitioner.

And your petitioner further avers that heretofore, to wit, on the 27th day of January, 1885, and on divers other days since that time, it made application and demand to and upon the said telephone company for it to place one of its telephones in petitioner's office, at No. 205 North Third St., in said city of St. Louis, and for the telephonic facilities as aforesaid to be therewith connected; and your petitioner was then and there ready and offered and tendered and still is ready and offers and tenders the payment of the rates and the compliance with the rules as fixed by said telephone company for its other customers for the like service and facilities; but the said telephone company, in contravention and violation of its charter obligations and of its duties to the public and to petitioner,
58 has refused to comply with your petitioner's application and demand, made as aforesaid, and then and there refused and still does refuse to grant to this petitioner the use of a telephone or telephonic facilities applied for as aforesaid upon the ground and for the reason, as stated and alleged by said telephone company, that a certain bill, known as "House bill No. 245," is pending in the General Assembly of the State of Missouri providing for the placing of telephone and telegraph wires in certain cities in this State, including St. Louis, under ground.

And your petitioner avers that it is a matter of special importance and value to it, for the convenient and economical conduct of its business, that it should have and enjoy the right of telephonic communication, as aforesaid, with the said subscribers of said telephone company, in the same manner and with the same privileges as are extended by said telephone company to its other subscribers, and that the said telephone and telephonic facilities applied for and demanded by this petitioner as aforesaid and refused by the said telephone company are valuable, though the exact amount that your petitioner has been or may be damaged by reason of the said refusal of said telephone company has and will be, by reason of the peculiar nature of said business, difficult and impossible to be precisely or definitely ascertained in an action therefor in a suit at law.

And your petitioner has no plain, speedy, or adequate remedy in the ordinary course of law for the wrong done to your petitioner as aforesaid or adequate remedy otherwise than by the awarding of the writ of mandamus herein prayed for.

And your petitioner avers that the business carried on and conducted by it in no way interferes or is in competition with that carried on and conducted by said telephone company as afore-
59 said, and that there is no valid reason why said telephone company may not furnish a telephone and telephonic facilities for petitioner's said offices as readily, conveniently, and economically as has been done in the case of other of its said subscribers.

Wherefore, in view of the premises, your petitioner prays that this court will grant a writ of mandamus against the said Bell Telephone Company requiring and commanding it and its officers and agents to place a telephone in the petitioner's said office and to give and maintain for petitioner the same telephonic facilities given by said telephone company to its other subscribers, and to place petitioner's name on its list of subscribers distributed to its subscribers as aforesaid; all to be done by the said telephone company upon the same rates and terms as are or may be given to its other subscribers or to other telegraph companies, and without discrimination against your petitioner. And your petitioner asks such other and further orders as may seem meet in view of the premises.

BALTIMORE AND OHIO TELEGRAPH COMPANY,
By GARLAND POLLARD, *Its Attorney.*

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

Thomas F. Clohesey, having been duly sworn, makes oath and says that he is chief operator and acting manager of the said Baltimore and Ohio Telegraph Company in the city of St. Louis, Missouri, and that the statements contained in the foregoing petition are true in substance and in fact to the best of his knowledge and belief.

THOMAS F. CLOHESEY.

Subscribed and sworn to before me this 23rd day of February, 1885.

[SEAL.] CHAS. B. STARK,
Notary Public.

60 And thereupon an alternative writ of mandamus was issued by the said circuit court, city of St. Louis, directed to the said Bell Telephone Company of Missouri, respondent, reciting the allegations of the petition and commanding the said respondent to comply with the prayer of said petition or show cause before the said circuit court, city of St. Louis, why it would not do so.

And thereupon the said respondent showed cause, in answer to said writ, by its return thereto, which was in the words and figures following:

Return of Respondent. Mandamus.

STATE OF MISSOURI, *City of St. Louis:*

In the Circuit Court, City of St. Louis. February Term, 1885.

THE STATE OF MISSOURI upon the Relation of The Baltimore and Ohio Telegraph Company of Missouri
vs.
THE BELL TELEPHONE COMPANY OF MISSOURI. } Room 1. Case No. 66784.

Now comes The Bell Telephone Company of Missouri, respondent above named, and for its return to the alternative writ of mandamus

heretofore issued in the above-entitled cause the said respondent states and shows to the court:

That the said relator ought not to have its writ of peremptory mandamus prayed for by said relator for the reasons hereinafter stated.

Respondent admits that relator is a corporation engaged in business as stated in said writ, and that this respondent is a cor-
61 poration organized under the laws of the State of Missouri, to wit, article 5 of chapter 21 of the revised statutes of 1879.

It is true that respondent has its principal office or place of business in the city of St. Louis, but it is not true that at the times in said writ stated respondent was or is in any other manner than as hereinafter stated engaged in transmitting for the public telephonic communications between its subscribers in said city of St. Louis or elsewhere, nor is it true that the business of respondent is done in the manner stated in said writ, but the said business is done in the manner hereinafter stated and not otherwise.

Respondent admits that it now has over twelve hundred subscribers or parties using telephones furnished by it as hereinafter stated and not otherwise, in connection with a system of wires as hereinafter described and not otherwise, and that said subscribers comprise various individuals, firms, and corporations residing or doing business in and about the city of St. Louis, each of whom is enabled by the facilities so furnished as hereinafter stated by respondent and not otherwise to hold telephonic communication with any other of the said subscribers.

It is true that respondent furnishes each of its said subscribers with printed lists showing the names and occupations of each of its subscribers, so that each subscriber may know the names and occupation of the various parties with whom his telephone may enable him to hold telephonic communication.

Respondent says it is not true, as stated in said writ, that respondent has heretofore, through its authorized agents or officers, announced or held itself in readiness or still does annouce or
62 hold itself in readiness to furnish public telephonic facilities in the manner in said writ mentioned to all persons, firms, or corporations, including other telephone and telegraph companies, who may desire to become subscribers therefor in the manner mentioned in said writ; nor is it true that this respondent is by law or in duty bound so to do; nor that respondent has promptly furnished all applicants therefor who have complied with its rates and terms as in said writ and petition stated with the said telephones and telephonic facilities, except in the case of the relator.

Respondent admits that on the 27th day of January, A. D. 1885, the said relator made an application to this respondent for it, said respondent, to place one of its telephones in said relator's telegraph office No. 205 North Third street, in the city of St. Louis; but said respondent states that said application was in writing and was made by said relator in and by a written communication addressed to this respondent and not otherwise, of which said communication the following is a true and complete copy—that is to say:

"BALTIMORE AND OHIO TELEGRAPH COMPANY,
ST. LOUIS, *Jan'y 27th*, 1885.

To the Bell Telephone Company of Missouri:

The Baltimore and Ohio Telegraph Company desires to become a subscriber to and a member of your telephone system, and to that end hereby requests you to place one of your telephones in its telegraph office at No. 205 North Third street, in this city, to furnish it with a list of your subscribers, and to put it in communication with such subscribers by means of said telephone, through your telephone exchange, on the same terms that similar telephonic facilities are furnished by you to other telegraph companies, with which terms this company is ready to comply.

63 THE BALTIMORE & OHIO TELEGRAPH COMPANY.
B. R. BATES, *Manager*."

Respondent further states that it is not true that it, the said respondent, in contravention or violation of its charter obligations or of its duties to the public or to said relator, has refused to comply with said relator's application and demand, nor is it true that respondent then and there refused or still refuses to grant to said relator the use of a telephone or telephonic facilities applied for as aforesaid upon the ground or for the reason as alleged in said writ, that a certain bill, known as "House Bill No. 245," was pending in the General Assembly of the State of Missouri, providing for the placing of telephone and telegraph wires in certain cities of this State, including St. Louis, under ground.

Respondent states the fact to be that about the time when said letter of January 27th was received at respondent's office and for the greater part of the following two weeks the general manager of this respondent, to whom the executive management of its business is chiefly committed, was necessarily absent from the city of St. Louis in connection with respondent's business, for which reason said application did not receive prompt attention.

That on or about the 10th day of February, 1885, one Thomas F. Clohesey, who, as respondent is informed and believes, was then and there the authorized agent of relator in that behalf, called at respondent's office and had a conversation with respondent's said agent in reference to said application of January 27th, in which conversation this respondent's said agent requested said relator, through its agent aforesaid, to defer pressing its said application for telephonic facilities for the time being on the ground then and there stated

64 to said relator's agent in that behalf, that there was pending in the General Assembly of the State of Missouri a bill such as mentioned in said petition, and that if said bill should become a law it might be construed to impose obligations on this respondent in respect of the further conduct and management of its business which might render it impossible for this respondent to further extend its said business or to supply telephonic facilities to other subscribers, and at the request of said Clohesey respondent, by its said

agent in that behalf, made answer in writing to said application of relator of date January 27th, 1885, substantially to the same effect as had been verbally stated to him, a copy of which writing is in words and and figures, to wit:

B. and O. Application for Exchange Service.

In reply to yours of Jan. 27th.

THE BELL TELEPHONE COMPANY
OF MISSOURI, 417 OLIVE STREET,
ST. LOUIS, *February 10th,* 1885.

B. R. Bates, Esq., manager Baltimore and Ohio Tel. Co., St. Louis, Mo.

DEAR SIR: Enclosed please find copy of House Bill No. 245, now pending at Jefferson City. This bill is on the calendar for engrossment, but at our urgent request was laid over.

In view of the possibility that this bill may become a law I have to suggest that your application for exchange service should be held in abeyance until the bill is finally disposed of.

We have no desire to unnecessarily delay action upon your
65 application, but as a matter of prudence feel justified in deferring all applications for service until we are relieved from the uncertainty of the present situation.

The Legislature will adjourn in about thirty days, when, if not before that time, we will respond to your application in a definite manner, as already indicated to your representative.

Yours truly,
(Signed) GEO. F. DURANT,
Gen'l M'g'r.

Respondent further states and avers the fact to be that at the time of and in said conversation last above mentioned this respondent, by its said authorized agent in that behalf, further stated to relator's said agent that if said relator would sign and present to said respondent an application in form and upon the terms and conditions such as were and are required to be signed by the subscribers to said respondent's telephonic exchange and upon the like terms and conditions with other subscribers this respondent would not refuse to place a telephone in the office of said relator and furnish it with telephonic facilities, but upon the terms and conditions in said application contained (being the same terms and conditions which have been and are in all cases required of other subscribers to the telephonic exchange carried on by said respondent in the said city of St. Louis) would furnish the same to relator.

And respondent further states that at the time of said conversation and in connection with the statement so made for respondent as last above set forth respondent's agent then and there furnished to the said agent of the said relator a copy of an application for telephonic facilities such as was then and there mentioned as aforesaid, which

copy the said agent of relator then and there took away with
66 him for the purpose, as respondent's agent then and there understood, of considering the same.

And respondent avers that the said form of application of which a copy was so furnished to and then and there received and taken away by the said agent of said relator, was in words and figures following—that is to say:

Form 79 A.

Subscription to Telephonic Exchange.

The Bell Telephone Company of Missouri.

Terms and conditions.—The instruments and lines on the subscriber's premises shall be carefully used, and only as herein stated, all ordinary expense of maintenance and repair to be borne by the Bell Telephone Company of Missouri. He is to pay $10 for each telephone or call box destroyed otherwise than by unavoidable accident, and $25 per month in case of unauthorized removal or detention until its destruction or its loss without his fault is satisfactorily proved, but the payment shall not confer any title to the instrument or right to use it. In case communication is interrupted from any cause whatever the Bell Telephone Company of Missouri shall make all necessary repairs as expeditiously as possible, but shall not be liable for the consequences thereof.

For loss or damage that occurs in the course of employment of any messenger it shall not be liable beyond twenty times the charge made for such messenger service. The Bell Telephone Company of Missouri will remove the instruments from place to place during the
67 term within the territory covered by the exchange lines upon request and payment of the expense thereof. Upon non-payment of any sum due or any use of the instruments on said premises improper or contrary hereto or any removal therefrom the Bell Telephone Company of Missouri may terminate the subscriber's rights by written notice served on him or any occupant of the premises, and sever his connection and remove the instruments, and for this purpose and for inspection it and its servants may have access thereto.

The right of the subscriber is to use the instruments and connecting wires where the Bell Telephone Company of Missouri may place them, under such rules as the Bell Telephone Company of Missouri may from time to time prescribe, for the purpose of personal communication with the exchange and with parties whom the Bell Telephone Company of Missouri may connect with him for that purpose, upon his and their business; they are not to be used for any toll or consideration to be paid by any person other than the subscriber, nor for performing any part of the work of collect-, transmitting, or delivering any message in respect of which any toll or consideration has been or is to be paid to any party other than the Bell Telephone Company of Missouri, nor for transmitting market quotations or news for sale, publication, or distribution, nor

for calling messengers, except from the central office, or performing any other service in competition with service which the Bell Telephone Company of Missouri may undertake to perform. Said instruments are the property of the American Bell Telephone Company, are constructed and used under its patents, and are leased and licensed by it only for the uses above stated in consideration of a royalty and rental which it is to receive therefor, part of the payment named below, and which the Bell Telephone Company of Missouri is authorized to collect for a period not exceeding
68 one year in advance; but any use otherwise or without the payment of said rental or royalty is also an injury to and invasion of the said rights of the American Bell Telephone Company, entitling it to an injunction and other legal redress in a suit in its name and behalf, and to the remedies, by taking possession of instruments and lines and collecting rentals from the subscriber, as provided in the contract between the said company and said Bell Telephone Company of Missouri, and which the subscriber agrees to permit and to pay.

In view of the liability to errors in transmitting oral messages by telephone and the impossibility of fairly fixing the cause thereof the subscriber assumes all the risk of errors from misconnections or mistakes upon and by any telephone line and the officers and servants thereof in transmitting, receiving, or delivering messages, and in respect of any messages which may be sent or received by or for him over any other telephone or telegraph line no line shall be responsible for defaults occurring on any other line nor on its own lines, as specified in its usual contracts, nor for any damages unless the claim therefor be presented in writing within thirty days after sending the message, and he makes the Bell Telephone Company of Missouri and every other line over which said message may pass his agent to receive the same to forward it towards destination at the rate for unrepeated messages, and for that purpose to bind him by the contracts on the usual blanks and make the message subject to the usual limitations, rules, and regulations, to which he hereby agrees, he will reimburse the Bell Telephone Company of Missouri for all tolls it may pay on such messages.

All the obligations hereof are binding on the subscriber until the instruments shall be redelivered to the Bell Telephone Com-
69 pany of Missouri or the American Bell Telephone Company or until, being bound and requested and having an opportunity to remove the same, they shall neglect to do so. All words herein referring to the subscriber shall be taken to be of such number and gender as the character of the subscriber may require.

The subscriber requests the Bell Telephone Company of Missouri to place in the premises, ——, one telephone, one transmitter, one call box, and switch and connect them for his use with the company's exchange, for a term of one year, from ——, 188–, to ——, 188–, upon the terms and conditions stated above, which he hereby promises to keep and perform, and agrees to pay therefor to said company the sum of one hundred dollars per annum, payable semi-annually, in advance.

This request becomes a binding contract as soon as accepted by an executive officer of the Bell Telephone Company of Missouri by his signature hereto or by furnishing the instruments herein asked for. The terms of this contract cannot be varied nor waived by any representations or promises of any canvasser or other person unless the same be in writing and signed by the manager.

The subscriber acknowledges that he has received a duplicate hereof.

Signed at St. Louis ——, 188–. Accepted by the Bell Telephone Company of Missouri.

And respondent avers the fact to be that the said form of application is in the form and contains the terms and conditions in accordance with and upon which, and not otherwise, this respondent has been in the habit of furnishing telephones and telephonic
70 facilities to its subscribers in said city of St. Louis, and that in and by the said offer so made for respondent as aforesaid to said relator's agent in that behalf, namely, that if said application were insisted on this respondent would furnish to said relator the telephonic facilities upon the terms and conditions in said form contained and set forth, this respondent did then and there, without discrimination or favoritism, offer to afford and furnish to said relator the like privileges which it has offered and afforded to its subscribers in general.

But this respondent further states that its said offer to furnish to said relator a telephone and telephonic facilities, to wit, upon the terms and conditions aforesaid, has never been accepted by relator nor has said relator or any agent thereof at any time ever made application therefor to this respondent by signing or presenting an application in the form or upon the conditions hereinbefore set forth or equivalent thereto, but has hitherto failed and refused to avail itself of the said offer so made by respondent or to become entitled by compliance therewith or by accepting said conditions of telephonic facilities upon the like terms and conditions upon which the same are furnished to the subscribers of this respondent generally.

Respondent denies that it is a matter of special importance or value to relator, for the convenient and economical conduct of its business, that said relator should have or enjoy the right of telephonic communication asked for by it, and denies that the said telephone and telephonic facilities applied for and demanded by said relator, as alleged and as alleged refused by respondent, are or would be valuable to relator, and denies that relator has been or may be damaged by reason of respondent's alleged refusal in any manner whatever.

71 Respondent also denies the allegation in said writ to the effect that the business carried on and conducted by said relator in no way interferes or is competitive with that carried on and conducted by respondent.

Respondent denies that it has in any respect failed or refused to fulfil any duty to said relator or has discriminated against said relator or has required or exacted of said relator any terms or con-

ditions from those which this respondent does and of right may require from its subscribers generally, and denies that by reason of any act or thing done or refused to be done by the respondent said relator is entitled to the relief by it prayed in this behalf.

And for a further return to said writ respondent states that on the 27th day of February, 1885, after service upon this respondent of the alternative writ issued by this honorable court in this behalf, but before the return day of said writ, this respondent renewed its said offer to relator above mentioned by addressing and delivering to said relator, by its agent duly authorized in that behalf, a further communication in respect of and in reply to its said application of January 27th 1885, which communication was signed for this respondent by its vice-president and authorized agent in that behalf and was in words and figures following:

"THE BELL TELEPHONE COMPANY OF MISSOURI,
417 OLIVE STREET, ST. LOUIS, *Feb. 27th*, 1885.

To The Baltimore and Ohio Telegraph Company, B. R. Bates, manager, St. Louis, Mo.

72 DEAR SIR: Referring to your request that your office, No. 205 North 3rd street, St. Louis, be connected with our telephone exchange and that you be furnished with telephones for that purpose, we have to say that we are ready to make the connection for the purposes and upon the terms and conditions which are set forth in our regular form of exchange subscription, a copy of which is enclosed.

This form, as you will observe, prohibits the use of the instruments furnished for the transmission of messages for hire or for doing any part of the work of collecting (transmitting or delivering telegraph messages) or for the performing of messenger or any other service which the exchange may undertake to perform.

We have not the right to furnish the instruments for any purpose other than those permitted by said form, which, as we have said, is our regular form.

Please inform us whether you desire the connection upon these terms and conditions.

Yours truly,

(S'g'd) GEO. F. DURANT,
Vice-President."

Respondent states that said letter of February 27th was also accompanied by a copy of the printed form or blank application hereinbefore mentioned and set forth, and which was in said letter referred to as accompanying the same; and for the contents, terms, and conditions thereof the respondent respectfully refers to the copy thereof hereinbefore set forth as "Form 79 A."

Respondent further states that four days after said communication of February 27th above set forth had been so addressed to and received by said relator this respondent received from said
73 relator an answer in writing thereto signed, as respondent is

informed and believes, by the authorized agent of the relator in this behalf, and which answer is in words and figures following:

"BALTIMORE AND OHIO TELEGRAPH COMPANY,
ST. LOUIS, MO., 3-3, 1885.

Geo. F. Durant, Esq., vice-president Bell Telephone Company of Mo.

DEAR SIR: Yours of the 27th ult., with form of exchange subscription, has been received and considered.

The only condition in the form of subscription to which we see any objection is that which provides that 'they (the instruments and wires, are not to be used for the performing any part of the work of collecting, transmitting, or delivering any messages in respect of which any toll or consideration has been or is to be paid to any party other than the Bell Telephone Company of Missouri.' If the toll or consideration referred to in this clause means toll or consideration for the work of collecting, transmitting, or delivering messages through the telephone the condition is unobjectionable and we will sign the contract; but if the meaning is that messages which have passed or are to pass over the wires of this company and for which this company has made or is to make a charge for the telegraphic service performed by it alone cannot be received or delivered by this company through the telephone, no charge being made for or on account of such telephonic service, the condition is objectionable and this company cannot sign the contract with that provision in it.

Yours truly, BALTIMORE AND OHIO TELEGRAPH COMPANY,
By BEN'N R. BATES, *Manager*."

74 Respondent states that the said communication under date of March 3rd, 1885, a copy of which is above set forth, is the only answer which respondent has received to said offer so made by respondent as aforesaid, and further states that it, said respondent, is advised and therefore shows to the court in and by its said communication last above set forth said relator has refused to accept or avail itself of the said offer of telephonic facilities so made to said relator by this respondent upon the terms and conditions aforesaid, being the same terms and conditions upon which telephones and telephonic facilities are by respondent supplied to its subscribers generally, and respondent submits to the court whether said relator ought further to have or maintain its said writ in this behalf.

And for a further return in this behalf respondent states and shows to the court that the several terms and conditions in said form of application contained, being the form required to be signed by the several subscribers to respondent's telephonic exchange, are not only reasonable, but necessary to be required and prescribed by this respondent for the proper and lawful conduct of its business for the reasons following:

Respondent states that all the electric-speaking telephones heretofore and now in use by it in the manner hereinafter stated are the

property of the American Bell Telephone Company, a corporation organized under the laws of the Commonwealth of Massachusetts; that said last-named corporation owns certain letters patent of the United States granted to Alexander Graham Bell under date of March 7th, 1876, and January 30th, 1877, numbered, respectively, 174,465 and 186,787; that said electric-speaking telephones are all constructed under and covered by said letters patent; that
75 respondent has acquired the right as lessee and licensee of said instruments to use the same by contracts of license and lease from said American Bell Telephone Company, nor has this respondent any lawful right to use said telephones or to permit others to use the same except under said license and in virtue of and in accordance with the patent laws of the United States touching useful inventions.

Respondent further states that its contract with said American Bell Telephone Company, under and by virtue whereof and not otherwise this respondent has the lawful right to use and supply to others for use any of the telephones above mentioned, provides among other things, as follows:

"For the purpose of this contract a telephonic-exchange system means a system entirely within said territory in which different circuits are connected, with a central or branch office of the exchange, attended by an agent of the exchange, for the purpose of placing subscribers or other parties by such circuits in telephonic communication with such central or branch exchange office or with each other, either directly or through the agents of the system. No office or line of an exchange can be connected with any point outside of said territory nor with any telegraph company's office or line except by lines of the licensor or parties specially designated by it for this purpose, and no telegraph company, unless specially permitted by the licensor, can be a subscriber or use the system to collect or deliver messages from it to its customers. * * *

"That no person engaged in the business of transmitting messages for other parties shall be authorized or knowingly allowed by the exchange to transmit such messages over such lines."

76 Respondent further states that by and under said contract of lease and license said American Bell Telephone Company, the owner as aforesaid of said patents covering said instruments, reserves to itself exclusively the use thereof for collecting, transmitting, and delivering all messages for electrical transmission to or from points outside of the territory named in its said contract with the respondent, to wit, the city of St. Louis and other territory in said contract specified.

Respondent further states that under and pursuant to said contracts of lease and license, and as the conditions upon which such license was granted to this respondent, said American Bell Telephone Company has prescribed the form of contract to be made for the use of said instruments between respondent and its subscribers, being the same form in this return above set forth as "Form 79 A," and upon the conditions prescribed in which form this respondent, as hereinbefore stated, has already offered to supply said relator with

a telephone and telephonic facilities, but which said relator has refused as aforesaid to accept.

That said form of contract so prescribed by said American Bell Telephone Company among other things provides that said instruments and connecting wires shall not be used "for performing any part of the work of collecting, transmitting, or delivering any message in respect of which any toll or consideration has been or is to be paid to any party other than the exchange," to wit, this resondent, "nor for transmitting market quotations or news for sale, publication, or distribution, nor for calling messengers, except from the central office, or performing any other service in competition with service which the exchange may undertake to perform."

77 And said form of contract prescribed by said American — Telephone Company further limits "the right to the subscriber to use the instruments and connecting wires * * * for the purpose of personal communication with the exchange and with parties whom the exchange may connect with him for that purpose upon his and their business."

Respondent further states that under and pursuant to said contract of lease and license respondent has established and is operating telephonic exchanges in the city of St. Louis and elsewhere within the territory mentioned in said contract, which, as its said exchange in said city of St. Louis, *which* it conducts in the manner following, to wit:

It has a central office in the said city of St. Louis; it places one of the electric-speaking telephones, leased from the American Bell Telephone Company under its said contract, in the office or residence of its subscriber and connects said instrument by a special wire with said central office; this wire, when direction is given over a second wire, hereinafter mentioned, is connected at said central office with a like special wire of any other subscriber with whom the subscriber first mentioned desires to have communication, and so remains in such connection until direction over the second or call wire is given to sever such connection; said second or call wire is common to a large number of subscribers upon the same circuit, but said first-mentioned wire is a special and distinct wire connecting said central office with each instrument leased and used as aforesaid; or, in some cases, said call wire is dispensed with and the other connecting the wires is made over the special wire. Each one of said instruments is the property of said American Bell Telephone Company, constructed and used under its patents

78 aforesaid and leased and licensed by it to respondent for the uses stated in said contract in consideration of a royalty and rental which respondent is authorized and undertakes to collect from its subscribers and account for to said American Bell Telephone Company.

Respondent is advised and therefore states and shows to the court that under the terms of its said contract with said American Bell Telephone Company and of its said license from said last-mentioned company under said patents above mentioned it would be a violation as well of its said contract and license aforesaid as of the patent

laws of the United States in such case made and provided for this respondent to permit the relator, which is a telegraph company, to become a subscriber to the telephonic exchange conducted by this respondent, unless especially permitted by said American Bell Telephone Company, licenser, but that this respondent has obtained permission from said licenser to accept said relator as a subscriber, provided and upon condition that said relator should accept the said conditions so prescribed as aforesaid by said American Bell Telephone Company as such licenser under said patents, and should contract for such telephone and telephonic facilities upon the conditions and in the form hereinbefore stated and not otherwise.

The respondent is advised and therefore states and shows to the court that under and by virtue of the laws of the United States securing to inventors the benefits of new and useful inventions by letters patent, granting to them and their assigns the exclusive right to make, vend, and use the same, and authorizing such patentees to assign and transfer to other persons upon such conditions as they may prescribe the rights and privileges secured under such
79 letters patent, it is not lawful for any person to make, vend, or use or permit to be used any invention secured by letters patent of the United States, except with the consent of and upon the terms and conditions prescribed by the patentees of such inventions or their assigns, and that under and in virtue of the said laws of the United States touching patents for useful inventions it would be unlawful for this respondent, under the circumstances above stated, to contract with said relator for or to furnish unto said relator the use of a telephone and telephonic facilities such as in said writ and petition mentioned, except upon the terms and conditions so prescribed by said American Bell Telephone — in that behalf.

Wherefore this respondent says that in and by its said offer heretofore made to said relator as hereinbefore stated to furnish to said relator a telephone and telephonic facilities such as are enjoyed by other subscribers of the respondent, but upon the terms and conditions nevertheless contained in said form of contract hereinbefore set forth and not otherwise, this respondent has fulfilled its own duties as licensee of said American Bell Telephone Company, and has only insisted upon a compliance by said relator with the requirements of the laws of the United States in that behalf.

And, having fully answered, said respondent prays judgment that said relator take nothing by its writ and for costs.

HITCHCOCK, MADILL & FINKELNBURG,
Attorneys for Respondent, with Whom is E. T. Allen.

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

George F. Durant, undersigned, being first duly sworn, on his
80 oath states that he is the vice-president and general manager of the Bell Telephone Company of Missouri, named as respondent in the foregoing return; that affiant had read the said foregoing return and knows the contents thereof, and that the matters therein

stated are true, except as to matters stated upon information and belief, and as to those matters he believes them to be true.

GEO. F. DURANT.

Subscribed and sworn to, at said city of St. Louis, this 5th day of March, A. D. 1885, before me, the undersigned, a notary public within and for said city of St. Louis and State of Missouri, duly commissioned and qualified and acting for a term to expire on the 28th day of June, A. D. 1885.

[SEAL.]

EDWARD S. ROBERT,
Notary Public within and for said City of St. Louis, Missouri.

And thereupon the said relator filed its motion in that behalf for a writ of peremtory mandamus, notwithstanding said return, which motion was in the words and figures following:

Motion for Peremptory Writ. Mandamus.

In the Circuit Court, City of St. Louis, State of Missouri.

THE STATE OF MISSOURI upon the Relation of THE BALTIMORE & OHIO TELEGRAPH COMPANY OF MISSOURI

vs.

THE BELL TELEPHONE COMPANY OF MISSOURI.

And now comes the relator, The Baltimore and Ohio Telegraph Company, and moves the court to award and issue a peremptory
81 writ of mandamus against respondent, as prayed for in its petition, notwithstanding the return of said respondent, because:

1. The return does not show cause why the peremptory writ should not issue, and,
2. The facts stated and admitted show that, on the face of the pleadings, relator is entitled to the writ.

GARLAND POLLARD,
Att'y for Relator.

And afterwards said cause was removed, on petition of said respondent, and bond given according to the statute in such case made and provided, to the said circuit court of the United States for the eastern district of Missouri.

And the said cause coming on to be heard at the said March term, A. D. 1885, of the said circuit court of the United States, and upon the consideration of said motion for a peremptory writ of mandamus, it occurred as a question—

Whether it was competent for this court in this proceeding to compel this respondent by its writ of mandamus to furnish a telephone and telephonic facilities to any other individual or company or upon any other terms or conditions than those permitted by the terms and conditions of the license under which said respondent is

authorized to use the telephones operated by it, the said Bell Telephone Company of Missouri, the said telephones, and all of them, being the property of the American Bell Telephone Company, assignee of the several letters patent of the United States under which said telephones are constructed and used and licenser thereof to said Bell Telephone Company of Missouri;

And it was also a question—

Whether such peremptory writ of mandamus should be granted in a proceeding to which said American Bell Telephone Company, assignee of said letters patent above mentioned and licenser as aforesaid, was not a party.

82 Upon which questions, and each of them, the opinions of the said circuit judge and the said district judge were opposed.

Whereupon, on motion of said respondent, by its counsel, that the points upon which the disagreement hath happened may during the term be stated under the direction of the judges and certified under the seal of the court to the Supreme Court of the United States to be finally decided:

It is ordered that the foregoing state of the pleadings and statement of facts, which is made under the direction of the judges, be certified according to the request of the said respondent, by its counsel, and the law in that case made and provided.

(Signed) DAVID J. BREWER,
Circuit Judge.

(Signed) SAMUEL TREAT,
Dist. Judge.

Upon the hearing of the aforesaid cause the following opinion was rendered and appears on file in words and figures as follows, to wit:

83 *Application for Mandamus.*

In the Circuit Court of the United States for the Eastern District of Missouri. March Term, 1885.

STATE OF MISSOURI *ex rel.* BALTIMORE & OHIO TELEGRAPH COMPANY
vs.
THE BELL TELEPHONE COMPANY OF MISSOURI.

MARCH 28TH, 1885.

The COURT (BREWER, J.), orally: In this case I regret to say that my brother Treat and myself do not agree fully as to the rights of the parties; it is an application on the part of the Baltimore & Ohio Telegraph Company to compel the Bell Telephone Company of Missouri, the company having the telephone business of this city, to permit telephonic communication between it and the petitioner, the Baltimore and Ohio Telegraph Company.

The defendant answers that it is engaged in the telephonic business here by virtue of a license obtained from the American Bell Telephone Company, a Massachusetts corporation; that by the terms of the license under which it does business it may not establish tele-

phonic connection with any telegraph company other than that permitted by the licenser, the holder of the patent, the Massachusetts company, and it further appears that such licenser has permitted telephonic communication with the Western Union Telegraph Company.

Now, the question is whether the court can compel this defendant, doing the telephonic business of this city, to establish
84 communication with any other individual or company than that permitted by its license from the patentee.

I believe fully in the sacredness of property, but I think all property stands on an equal basis, whether that property consists of gold dollars in your pocket, real estate, or the ownership of a patent. There is no peculiar sanctity hovering over or attaching to the ownership of a patent. It is simply a property right, to be protected as such.

Starting from that as a basis, while every property owner may determine for himself to what he will devote his property, yet the moment he puts that property into what I, perhaps, may, for lack of a better expression, define as the channels of commerce, that moment he subjects that property to the laws which control commercial transactions. Just as in the warehouse cases, Munn against the State of Illinois, decided by the Supreme Court of the United States and reported in 94 U. S., 113, in which that Court held that when an individual built a warehouse and put his property into that kind of business he subjected the property thus placed to the laws which controlled the transactions of commerce, involved in which was the power of the public through the Legislature to regulate rates. No man holding property was bound to build a warehouse or bound to put his property into that particular channel; but the moment he did so he put it where the Legislature could say, "You may charge so much and no more for the transaction of this business." He put his property into the channels of commerce, as multitudes are doing into the railroad business, into the express business, and into other channels of commerce. Whenever the property is put into these channels it is put within
85 the power of the public, speaking through its Legislature or the power of the court enunciating general rules operative upon such transactions to modify leases, modify licenses, control duties. So, notwithstanding this licenser has given to the licensee the right to establish a telephonic system in the city of St Louis, with telephonic communication with only certain prescribed telegraph system, the moment it permitted the establishment of a telephonic system here, that moment it put such telephonic system within the control of the State of Missouri, and the control of the courts enforcing the obligations of common carrier. A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all. It may not say to the lawyers of St. Louis, "My license is to establish a telephonic system open to the doctors and the merchants, but shutting out you gentlemen of the bar." The moment it establishes a telephonic

system here it is bound to deal equally with all citizens in every department of business, and the moment it opened its telephonic system to one telegraph company, that moment it put itself in a position where it was bound to open its system to any other telegraph company tendering equal pay for equal service.

So my conclusion is that, notwithstanding the terms of this license, which seem to inhibit it from dealing or giving its telephonic privileges to any other telegraph company than the Western Union, the moment it established its telephonic system here, that moment it compelled itself to respond to the demands of any telegraph company or any individual in the city tendering to it equal pay for equal privileges.

The application for mandamus will be sustained.

86 My brother Treat differs, however, from me, and may desire to express his difference of views.

The COURT (TREAT, J., orally): This is an application, it must be borne in mind, against the licensee, who has a license only in accordance with the terms thereof, and we are asked to mandamus that licensee to do what he has no authority to do under the terms of his license.

I know of no power in a court which can change a contract between the licenser and the licensee and give him a contract other than what he has made, either by enlargement or diminution. If this application had been made against the American Bell Telephone Company, which holds the patent, the patentee, it would have been a very different question, and the views expressed by my brother judge would then come up for consideration. But how is it that this licensee, who has only a restricted privilege, can by a mandamus of this court be permitted to do what under his contracts he cannot do? Can we make a new contract? Now, so far as the American Bell Telephone Company is concerned, which holds the patent, it reserved for itself the right with respect to telegraphic connections, and it is alleged in this petition that it has granted that to one company. Now, if the American Bell Telephone Company was here, as between it and this party petitioner, the question presented by my brother judge would have arisen, and in that, possibly, we might not have differed at all.

This matter is not a new one in the courts. In the noted case in Ohio the court proceeded, not as — this case, because there were two parties defendant, or respondents, to wit, the American Bell Telephone Company, that had all these rights, with which it had

87 not parted; also the local company and the charter of the State in connection therewith. There is no such case here.

A like case to this was reviewed very elaborately by the Connecticut supreme court, I think in 49 Conn., where precisely the views I am expressing were entertained, and they seemed to me a demonstration, and express more clearly and forcibly than I can do in this summary manner the true doctrine arising out of the sanctity of contracts.

If this party wishes the American Bell Telephone Company to grant equal privileges to it with another telegraph company, let it

pursue it, make it do what you ask; but I cannot see by any true theory of the law why this local party is to have its rights enlarged and its duties correspondingly enlarged in violation of the contract under which it rests.

There may be many reasons, of course, no judicial notice of them being taken, why this restriction was made, to wit: Here is a telephonic system in St. Louis. Each of you present here may wish, under the terms stated, to have such telephonic connection. It is stated in the license, which is a contract, that no one of you shall use that for the purposes of taking tolls thereon. In other words, if I have a telephonic connection at my house and I pay whatever the figure is for it, I am not to open a general telephonic system there and let the whole neighborhood come in and use my telephone and pay me therefor, and thus destroy the telephone company's income. It is a personal right, restricted to the use of the individual and his immediate needs.

When you bring a telegraph company into operation in connection with it, what would happen? At the telegraph stations here probably there are thousands of messages coming in every
88 day. It is receiving for these telegrams a given amount of money and taking its tolls thereon. Further than that, instead of doing as heretofore—employing its messengers to do this work—we are asked to compel this telephone company to do that messenger work for it, as an individual would do in permitting his telephone to be used 400 to 500 times a day. It may be for general purposes and the whole telegraphic business of the country poured on this telephonic system and done at a low figure. That, I suppose, was one of the reasons why this restriction was put there.

But suffice it to say, in my judgment, there is no authority and no courts to compel a man to do what he has no right to do and force him to violate his contract. He stands on his contract as he has made it, and there ends his duties, obligations, and rights, and courts cannot cause him to violate it. That is my view of the case. Parties must pursue the American Bell Telephone Company if they wish this question to be presented. It cannot arise in this way.

The COURT (BREWER, J., orally): I may be pardoned for suggesting, and I do it with great deference, because, as you all know, gentlemen, I share with all the members of the bar in this district in a profound admiration for my brother, Treat, but there are two things which seem to me to make against his argument very strongly.

I agree with him that if this telephonic system had refused a telephonic connection with any telegraph company that the Baltimore & Ohio Telegraph Company could not insist upon such connection, but when it has established a telephonic connection with one telegraph company I think every other telegraph company has
89 equal right; on the same principle that if it established a telephonic connection with one lawyer, it could not refuse telephonic connection with another lawyer, and the further practical question, that while there may be a contract between the licenser and licensee, the licenser is not a citizen, an inhabitant of or found within this district. Suppose this petition went to Massachusetts

and obtained a decree there binding the licenser; that would not bind the licensee; that would not disturb the contract, so far as the licensee is concerned. Would the court in Massachusetts have entertained a suit seeking to establish a naked legal right and without practical benefit to any one? The licensee does not live in Massachusetts. The licenser does not live in St. Louis. Practically, of what avail would a decree be against a licenser in Massachusetts? Would it bind the licensee here? Haven't you got in a last resort, a last analysis for practical results, to come right to the licensee, the holder, the distributor of the telephonic system here?

The COURT (TREAT, J.): You omit one consideration (and I may say we are not going into a discussion of the question on the bench); but it so happens that the licenser by the very terms of his license is the only party to make connection. He has done it, and the licensee has nothing to do with it. If you compel the licenser—in whom alone is reserved this privilege—to equalize the matter, he does it. It is immaterial whether the licensee agrees with whatever the licenser says shall be done; hence the licensee wouldn't be a necessary party anywhere.

The COURT (BREWER, J.): This question will be settled finally by the Supreme Court.

Mr. E. T. ALLEN: I will ask, in view of what has been expressed by the court, whether it wouldn't be proper that your honors should make up a certificate of a difference of opinion, in order that there may be no difficulty in regard to the amount that is involved?

The COURT (TREAT, J.): An affidavit will settle that.

The COURT (BREWER, J.): I do not think it would avail particularly unless, as I gathered from what Justice Miller said to me last fall, that the Supreme Court looks a little more kindly on a case where there is a certificate of division in respect to a motion for advancement. As far as the mere question of amount is concerned, I think that can be settled without difficulty.

The COURT (TREAT, J.): That has been settled, Mr. Allen, repeatedly. In looking for something else I found repeated decisions on the point, but there is no dispute as to the practice. An affidavit as to values will be sufficient.

Mr. ALLEN: This is a very important question, and it has been, as your honors have observed, passed upon quite differently in two courts of last resort in the States of Connecticut and Ohio, and it is very desirable that it should be speedily passed upon in the Supreme Court.

The COURT (TREAT, J.): All you can do is to make an affidavit and let it go with the papers, stating that the amount involved is over $5,000. It involved your system, and I suppose you can state that conscientiously. You can take it to the Supreme Court at once and we will note there is a division of opinion, so that it can be advanced.

The COURT (BREWER, J.): Anything that the court can do to further the advance of the case there it will gladly do.

91 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true, full, and complete transcript of the record and proceedings in case No. 2499, of State of Missouri *ex rel.* Baltimore & Ohio Telegraph Company of Missouri, plaintiff, against Bell Telephone Company of Missouri, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district, this 24th day of April, in the year of our Lord eighteen hundred and eighty-five.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of said Court.

[Endorsed:] No. 2499. United States circuit court, eastern district of Missouri. State of Mo. *ex rel.* Baltimore & Ohio Telegraph Co. of Mo. *against* Bell Telephone Company of Missouri. Duly certified transcript in the above-entitled cause.

92 In the Supreme Court of the United States.

THE BELL TELEPHONE COMPANY OF MISSOURI, Plaintiff in Error,

vs.

THE STATE OF MISSOURI at the Relation of THE BALTIMORE AND OHIO TELEGRAPH COMPANY OF MISSOURI, Defendant in Error.

In error to the October term, in the year of our Lord one thousand eight hundred and eighty-five.

Afterwards, to wit, on the second Monday of October in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Bell Telephone Company of Missouri, by Henry Hitchcock and Edmund T. Allen, its attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that the petition and alternative writ aforesaid and the matters therein contained are not sufficient in law for the said State of Missouri, at the relation aforesaid, to have or maintain its aforesaid action thereof against the said Bell Telephone Company of Missouri.

93 There is alse error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given and the peremptory writ of mandamus prayed for by the said relator was awarded to the said relator, to wit, the said Baltimore and Ohio Telegraph Company of Missouri, against the said Bell Telephone Company of Missouri, whereas by the law of the land the said judgment ought to have been given for the said Bell Telephone Company of Missouri against the said relator, and the said petition and alternative writ should have been by the judgment of said circuit court dismissed.

There is also error in this, to wit, that the said circuit court erred in sustaining the said motion of the said relator for the awarding of a peremptory writ of mandamus against the said Bell Telephone Company of Missouri, whereas by the law of the land the said motion should have been denied upon inspection of the return made by said Bell Telephone Company of Missouri to the said alternative writ of mandamus issued in said cause.

94 And the said Bell Telephone Company of Missouri prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it hath lost by occasion of the said judgment, etc.

HENRY HITCHCOCK,
EDMUND T. ALLEN,
Attorneys for Plaintiff in Error.

95 [Endorsed:] In the Supreme Court of the United States, October term, 1885. The Bell Telephone Company of Missouri, P. E., *vs.* the State of Missouri at the relation of the Baltimore & Ohio Telegraph Company of Missouri. In error. Assignment of errors by plaintiff in error. Filed April 10, 1885. A. P. Selby, clerk. Henry Hitchcock, Edmund T. Allen, attorneys.

Endorsed on cover: E. Missouri C. C. U. S. No. 232. The Bell Telephone Company of Missouri, plaintiff in error, *vs.* The State of Missouri *ex rel.* The Baltimore and Ohio Telegraph Company. Filed June 1, 1885.

Office Supreme Court U. S.
FILED.
SEP 10 1887
JAMES. H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

No. 340.

HENRY CALLENDER,
Plaintiff in Error,

vs.

CLARK E. BATES.

BRIEF OF PLAINTIFF IN ERROR.

W. K. MENDENHALL,
OF COUNSEL.

WILKES & WELLS, Attorneys for Plaintiff in Error.

SIOUX FALLS:
DAKOTA BELL PUBLISHING CO.
1887.

IN THE

Supreme Court of the United States.

No. 340.

HENRY CALENDER, PLAINTIFF IN ERROR,

vs.

CLARK E. BATES, DEFENDANT IN ERROR.

ABSTRACT OF THE CASE.

REFERENCES ARE TO PAGES OF THE PRINTED RECORD.

COMPLAINT.

(Pages 1 and 2.)

TERRITORY OF DAKOTA, *County of Minnehaha:*

In District Court, Fourth Judicial District.

CLARK E. BATES *vs.* HENRY CALENDER.

The plaintiff complains and alleges—

First. That on November eleventh, 1879, the plaintiff was and for a long space of time had been, and still is, a resident of said county, and residing at Sioux Falls with his family, and at that date was the owner and in possession of certain personal property within said county, to-wit:

One lumber wagon with the appurtenances, one double set of harness, and the contents of two loaded wagons, comprising four sacks of onions, ten bushels and twenty-five pounds of beans, eleven hundred and thirty pounds of pork, eight hundred pounds of flour, three bushels of pop-corn, four hundred and ninety pounds of butter, twenty bushels of oats, one tent with appurtenances, one stove, four blankets, two wagon sheets, two revolvers, a lot of provisions and other articles of personal property; also thirteen bushels of oats and forty-two turkeys, not a part of such contents, all of the value of five hundred and fifty-eight dollars.

Second. That on said eleventh day of November, 1879, the defendant, pretending and assuming to act as sheriff of said county under a certain warrant of attachment issued in a certain action wherein The City Bank of Minneapolis was named as plaintiff and the plaintiff herein and another, Charles Bates, were named as defendants, levied upon, seized, and took from the plaintiff's possession and forcibly carried away the above mentioned personal property, and said property was and is exempt from attachment.

Third. That on November twelfth, 1879, having notice of such pretended levy, and within less than three days thereafter, the plaintiff, at Sioux Falls, in said county, claimed and demanded of the defendant said property, as exempt, and the benefit of the exemptions allowed by law, and the surrender and return of said property to the plaintiff forthwith, as so exempt, which was by the defendant refused.

Fourth. That afterwards and about November thirteenth, 1879, three disinterested citizens of said county, not related to either party, were selected (*and*) as appraisers—one Ford by the plaintiff, one Cochran by the attaching creditors, and one Willey by the two latter persons—and an appraisement of said property was made by such appraisers, under the direction of the defendant, as such sheriff, the appraisers having first taken and subscribed an oath before such sheriff that they would truly, honestly and impartially appraise the property of the plaintiff herein, said Clark E. Bates, as required by law, and an inventory of said property was made by said appraisers, and the value thereof by articles and lots set down therein as required by law, showing the aggregate value of said property, less than five hundred dollars, and which appraisement and inventory was delivered to the defendant.

Fifth. That said warrant of attachment required the sheriff to levy only upon property of the defendants therein named not exempt from levy, and did not authorize the defendant to levy upon said property of the plaintiff or any part thereof, as the defendant well knew, and after such an appraisement the defendant was under obligation to surrender said property to the plaintiff upon demand.

Sixth. That, after such appraisement was had, towit: November fifteenth, 1879, at said Sioux Falls, the plaintiff again demanded of defendant said property and the surrender and return thereof as being so exempt, which the defendant then and there refused to surrender or to give the plaintiff possession of, but unlawfully and wrongfully detained from the plaintiff and converted to his own use.

Seventh. That by reason of said wrongful taking, detaining and converting of said property by defendant, and by reason of the oppression of defendant and his misconduct in office as such sheriff as aforesaid, the plaintiff sustained loss and damage in the sum of five hundred and fifty-eight dollars, the value and worth of said property as aforesaid, and in the further sum of one hundred and thirty dollars, for the hire and expense of keeping his servants and employees and their teams, hindered and delayed for a long space of time, to-wit, ten days, in the business and employment of the plaintiff, and in the further sum of one hundred and seventy-five dollars for his legal and other expenses incurred and expended by him in endeavoring to secure the return of said property, and in the further sum of three hundred and sixty dollars, loss and injury in the breaking up the business of the plaintiff in which he was then engaged, and for which said property was procured and was suitable, to-wit, transporting goods from Sioux Falls to Deadwood, in said territory, and back, for sale or exchange, and carrying passengers between said places, and in hindering and delaying the plaintiff, his servants and teams, in his said business, and in depriving the plaintiff of the means of carrying on the same, and in the loss of profits in such business, in all to the damage of the plaintiff in the sum of fifteen hundred dollars.

Wherefore the plaintiff demands judgment against the defendant for the sum of fifteen hundred dollars and costs of suit.

PETTIGREW & SWEZEY,

Plff's Attorneys.

AMENDED ANSWER.

(Pages 2, 3 and 4.)

TERRITORY OF DAKOTA, *County of Minnehaha:*

In District Court, Fourth Judicial District.

CLARK BATES, Plaintiff *vs.* HENRY CALLENDER, Defendant.

The defendant answers the complaint of the plaintiff and denies each and every allegation therein contained, except as hereinafter especially admitted.

Further answering, defendant alleges that at the time mention in the complaint he was the sheriff of said Minnehaha county, duly elected and qualified as such, and that by virtue of the warrant of attachment in the complaint mentioned he levied upon and seized certain personal property, and the levy seizure aforesaid constituted the supposed wrongful taking in the complaint alleged; that the said warrant of attachment was issued in an action then pending in this court, wherein The City Bank of Minneapolis was plaintiff and this plaintiff and Charles Bates were defendants, as copartners,—sued upon certain promissory notes executed by them in their firm name of C. Bates and Son, and the property so as aforesaid levied upon and seized was the property of said firm at the time of said levy, and as such subject to levy and seizure by said writ of attachment.

Defendant further alleges that, as by law provided in such cases, he gave notice of the aforementioned levy to said defendants on the eleventh day of November, 1879; whereupon the defendants, as partners, claimed on behalf of said partnership the benefit of the exemption by law allowed, and claimed as exempt from the seizure and levy aforesaid the property levied upon and taken by virtue of said warrant of attachment; and the aforesaid claim is the same claim and demand as is alleged in the complaint herein to have been made on November twelfth 1879; that thereupon, after the defendants in said action made said claim and demand, this defendant notified them that he would proceed to make appraisement of the property of said partnership in the manner provided for by law, to which appraisement the said parties agreed, and appraisers were duly selected in the manner by statute provided; all of which matters

fully appear by the records and files of said action in the office of the clerk of the court.

Defendant further alleges that after the appraisers selected as aforesaid had duly qualified as such and entered upon the discharge of their duties as such appraisers the said Charles Bates and this plaintiff, then defendant, as copartners, detained and kept from said appraisers certain of their goods and chattels, and refused to have an appraisement of all their personal property, so that from the same, if over the limitation in value, the said debtors might select the amount by law allowed, and the remainder thereof be made subject to legal process, and the appraisement proceedings aforesaid are the same, and is the supposed appraisement referred to in the complaint of the plaintiff herein.

Defendant further alleges that the personal property in the complaint described is the same in part as was levied upon by virtue of the writ of attachment aforementioned, and the same in part, upon which said Charles Bates and this plaintiff made the said claim of exemption on behalf of the said firm of C. Bates and Son; but defendant denies the allegation of the complainant as to the quantity and value of said property.

Third. For a further and separate defense the defendant alleges that at the time mentioned in the complaint he was the sheriff of said Minnehaha county, duly elected and qualified as such, and that by virtue of the warrant of attachment in the complaint mentioned he levied upon and seized certain personal property, and the levy and seizure aforesaid constitutes the supposed wrongful taking in the complaint alleged; that said warrant of attachment was issued in an action then pending in this court, wherein The City Bank of Minneapolis was plaintiff and this plaintiff and Charles Bates were defendants, as copartners, —sued upon certain promissory notes executed by them in their firm name of C. Bates and Son, and the property so seized upon, as aforesaid, was liable for the debts of said firm and subject to said levy by attachment.

That the plaintiff herein and said Charles Bates were but a short time prior to the alleged seizure and taking, and for about four years preceding that time had been, copartners as

C. Bates & Son, and the property in the complaint described, except some small portion thereof which was bought with moneys of said firm, belonging to said copartnership; that the said firm of C. Bates and Son had been extensive dealers in lumber and coal, and until within a few months prior to October twenty-first, 1879, had always carried a very large and full stock thereof; that with the fraudulent design and intention of defrauding their creditors said firm sold and disposed of the greater portion of their said stock and so reduced the same that on October twenty-first, 1879, there remained but a small and insignificant portion of the same on hand in the yard of said firm at Sioux Falls; that, further carrying out their said fraudulent designs, said firm, on or about said day, fraudulently dissolved their partnership and divided up and parcelled out among themselves individually the property of said partnership then remaining on hand, and the property in the complaint mentioned is in part the property so as aforesaid divided; that at the time of said dissolution of copartnership the said firm of C. Bates and Son were largely indebted to various creditors, the aggregate amount of their indebtedness being about twenty thousand dollars, as defendant is informed and believes, and the total amount of visible assets at said time was not more than four thousand dollars, including sheds and buildings, and said firm were then and there unable to pay their said firm indebtedness from their own property.

Defendant further denies that said property in the complaint described was exempt from levy and seizure, as by plaintiff claimed, and alleges that the said plaintiff had no right of exemption therein as an individual, in his own separate right.

Wherefore the defendant demands judgment for his costs herein.

WILKES & WELLS,
Def'ts Att'ys.

FACTS.

The firm of Bates & Son commenced business sometime in the year 1876, at Sioux Falls, with about $1,000 or $1,200 capital.

The firm was dissolved Oct. 21, 1879 and notice of dissolution was published in a local newspaper but no provision was made at the time of said dissolution for the payment of the firm debts, see notice of dissolution as published, (p. 57) The firm property was divided up between the partners.

The firm was at the time of said dissolution and prior thereto insolvent.

The City Bank of Minneapolis, a creditor of said firm to the amount of about $8,000, as shown by the files in the action wherein said City Bank is plaintiff and said firm of Bates and Son are defendants, (ps. 59, 60 and 61, record,) learning of said attempted dissolution, and that one of the members of said firm, the defendant in error, had already made arrangements to leave the country, brought suit, and levied an attachment upon such property of the late firm as could be found, and upon property purchased with the proceeds of moneys extracted from said firm, charging that said dissolution and appropriation of firm assets, was fraudulent, (see abs. p. 61,) which charge of fraud was not denied.

Each member of said firm claimed a several exemption of $1,500. The attaching creditor was willing to allow one exemption to the firm of $1,500, but not a several exemption to each member of the firm.

Suit was thereupon brought by both members of said firm against the sheriff for the conversion of exempt property.

This action was brought by plaintiff Clark E. Bates, upon the proposition that said firm of Bates and Son had a right though insolvent to dissolve, divide their firm property, each acquiring a portion thereof in severalty and claim an individual exemption therefrom as against any and all creditors, thereby effectually diverting all of the firm assets from the firm creditors to the respective members of the partnership.

The plaintiff—defendant in error—recovered judgment for $1,500.

The defendant—plaintiff in error—appealed to the supreme court of the territory, where said judgment of the district court was affirmed, and it is now brought to this court by writ of error.

Clark E. Bates testified in his own behalf (p. 6)

Q. What had been your business in Sioux Falls prior to the 21st day of October, 1879.

A. We kept a wood and coal yard and handled lumber.

Q. Who was associated with you in business?

A. My father.

Q. What is his name?

A. Charles Bates.

Q. (page 13.) At what time did you make your arrangements to go to the Black Hills?

A. Probably about the first of November. We dissolved partnership—made arrangements right away.

Q. What did you do in reference to the dividing up of your property at the time of the dissolution—what did you take and what did your father take?

A. I, took a span of gray horses and an old lumber wagon and harness, and had between five and six hundred dollars in money,—money I used to buy the stuff going to the Black Hills with.

Q. Who took the other property?

A. That that was left father took—the coal sheds and office and scales—and he took some money, (p. 16.)

Q. Had you any other property left after settlement and dissolution?

A. I had this little house and one lot where I lived.

Clark E. Bates testified on cross examination. (p. 21.)

Q. You state you were indebted to Merriman, Barrows & Co., at the time you made settlement?

A. Yes, sir.

Q. How much were you indebted; in what shape was the indebtedness?

A. Notes and accounts; some notes and open accounts.

Q. How much did the open accounts amount to, how many thousand dollars?

A. I don't remember.

Q. State about how much?

A. Might have been four or five thousand dollars.

Q. How much did the notes amount to?

A. I think the notes was eight thousand dollars as near as I can remember.

Q. Who else were you indebted to besides Merriman, Barrows & Co.?

A. I think we owed a lumber firm one hundred dollars for a car of lumber.

Q. What firm was that?

A. Bassett & C. M. Nelson I think we owed a couple hundred dollars, something like that.

Q. Who else?

A. Might have owed another firm a couple hundred dollars, something like that.

Q. Anything to another firm named Washburn & Co.?

A. Yes, sir.

Q. How much?

A. I think three or four car loads; I don't remember.

Q. About six hundred dollars?

A. I don't think it was quite that.

Q. What do you think it was?

A. Might have been about five hundred dollars; might have been a little over.

Q. You say you made a demand for this property of Mr. Callender after he took it?

A. Yes, sir.

Q. And that demand was in writing?

A. Yes, sir.

Q. How much money did you say you had on dissolution?

A. Probably five or six hundred dollars, might have been six hundred dollars.

Q. How much money did your father take?

A. I think somewhere about eight hundred dollars.

Charles Bates testified on behalf of plaintiff (p 29.)

Q. After the dissolution what transpired between you and him, in regard to the property that you had not turned over to the creditors?

A. He took a wagon and horses, and harness that belonged to these horses and five or six hundred dollars in money. I

forgot—we had been straightening up little bills around town in money.

Q. What, in general did you take?

A. I took the coal office and coal sheds and a little bit of a granary that stood there, and baskets and shovels, and some coal and some money.

Chas. Bates testified on cross examination, (p. 33.)

Q. At the time of the dissolution of this copartnership, what property did you take, and what did Clark E. Bates take?

A. I took the coal sheds and coal office and scales, and some coal that was in the sheds, the wagon and team never was in the business, I didn't take it, because they was always mine, didn't belong to the business.

Q. What else did you take—any money?

A. Yes, sir.

Q. How much money?

A. I think some seven or eight hundred dollars; between seven and nine hundred dollars; I don't recollect what it was.

Q. State to the jury the terms of the partnership existing between you and Clark Bates? How did you go into partnership, what was your terms?

A. When we came out to Dakota, he had some money, and I had some that was mine, he was to have half, if I recollect right, of what we made.

Q. He had some money, you say?

A. Yes, sir.

Q. How much?

A. I think about six hundred dollars—five or six hundred dollars—of course we had to get things to use outside of that.

Q. Did you testify in the case of Charles Bates vs. Henry Callender that he, Clark E. Bates didn't have any capital and you took him in and gave him a share of the profits, at the last term of this court?

A. I don't recollect that I did.

(p. 34.)

Q. Did you start in the business as equal partners?

A. I don't know that I would consider it so, I had a little means of course, I kept collecting in from the place I came from, and used it in the business.

Q. Was he to take half of the profits?

A. I believe he was.

Q. You didn't start in as equal partners?

A. Of course I had more than he had in there.

Q. Did you testify on the trial of Chas. Bates vs. Henry Callender, "that he, Clark Bates, was young and had nothing to commence with; I told him that he could have half that we could make."

A. I can't say, we have testified so much, been in court for the last three years."

Q. How much did you put in the business when you first started together?

A. About one thousand dollars, perhaps.

Q. Had Clark Bates put in six or seven hundred dollars of that?

A. Put in about that when we first started; he had about that; we kept collecting in little debts along; never kept track of how much I had put in. * * *

Q. When it came to the dissolution of the partnership, how did you divide up; did you divide equally?

A. No, sir; I took the most being the oldest, he was the youngest, more able to knock around, I would be entitled to the most.

Q. At the time of this dissolution of partnership was your firm indebted to the firm of Palmer, Leslie & Co.?

A. Not that I know of. I don't recollect hearing the name before.

Q. Were you indebted to a firm named Washburn & Co.?

A. Yes, sir.

Q. C. M. Nelson & Co.?

A. Yes, sir.

Q. Merriman, Barrows & Co.?

A. Not one cent's worth; we had a settlement with them.

Q. Were you indebted to a firm named Parker & Co.?

A. Yes, sir.

Q. Were you indebted to a firm named Carr, Stufton & Co., Dubuque?

A. I think that is the name of a firm we had owed a little.

Q. Have those accounts been paid?

A. No, sir.

Defendant's evidence, (p. 43.)

Chas. Hummel called and sworn in behalf of the defendant, testified as follows:

Q. Were you ever in the employ of Charles Bates and Clark Bates?

A. Yes, sir, I was.

Q. At Sioux Falls?

A. Yes, sir; Sioux Falls and Rockport, Dakota.

Q. You were a salesman, were you?

A. Yes, sir.

Q. Where did you board at the time you worked for them?

A. With Mr. Bates; with both the old gentleman and Clark E. Bates; also with their families.

Q. Did they do a large business?

A. I considered it so.

Q. Selling a good deal of lumber and material?

A. Oh, yes, sir.

Q. Did you ever hear any conversation of those two men in reference to their business?

A. Yes, sir, a number of times.

Q. Did you ever hear any conversation in reference to a failure?

A. I did.

Plaintiff's counsel objected as incompetent, irrelevant and immaterial.

The Court: The objection is overruled.

Plaintiff's counsel duly excepted.

Q. Go on, state what you heard and when you heard them.

A. I never heard them say anything in regard to doing this kind of business only when we were going up to and from meals. We usually went up together to dinner. I heard them

say that before the bankrupt law was out of existence, or about that time, if they would have large sales and get all the money they could they would not pay their creditors. I don't recollect of their saying about what time they would fail, but have heard them say if they had a yard at Rockport, Dakota, the men they had dealings with would not be so apt to find their property, they said it time and time again.

Plaintiff's counsel to the word "they" objected.

Witness—Both of them several times; it was common talk among them.

Q. About the time these talks occurred did they start some yards out on the Jim, Dakota.

A. Yes, sir.

Q. Where at?

A. Rockport, Dakota; afterwards at Firesteel.

Q. Did they take over much material there?

A. Yes, sir; a good many loads.

Q. Did this firm of Bates & Son carry a large stock of lumber while they were here in Sioux Falls?

A. Yes, sir; they bought at one time, I think they told me, five hundred thousand feet; they had it coming right along, (p. 46.)

Q. What is your business now?

A. Foreman of the Oshkosh lumber business at Mitchell.

Defendant offers in evidence files in case of City Bank of Minneapolis vs. Charles Bates and Clark E. Bates, doing business as C. Bates & Son, def'ts, pgs. 58, 59, 60, 61, 62 and 63.

TERRITORY OF DAKOTA, } ss.
Minnehaha County. }

In the District Court within and for said Minnehaha County, 4th Judicial District.

CITY BANK, MINNEAPOLIS, MINNESOTA,

vs.

CHARLES BATES & CLARK E. BATES, Doing Business as C. Bates & Son, Def'ts.

The Territory of Dakota sends greeting to Charles Bates & Clark E. Bates, doing business as C. Bates & Son, the aforenamed defendants:

You are hereby summoned and required to answer the complaint of the above-named plaintiff, a copy of which is herewith served upon you, and to serve a copy of your answer upon the subscriber, at his office, in the village of Sioux Falls, D. T., within thirty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer this complaint within that time, the plaintiff will take judgment against you for the sum of eight thousand three hundred and fifty-four ($8,354.20,) dollars and twenty cents, with interest thereon from June 3, 1879, on $931, and from July 21, 1879, —$3,209. 20, and from August 21, 1879, on $1,600, and from Sept. 6, 1879,—$2,614.65, besides the costs of this action.

Dated at Sioux Falls, D. T., this 10th day of November, A. D. 1879.

R. J. WELLS,
Plaintiff's Att'y.

I hereby certify that the within summons and complaint came to my hand Nov. 10, 1879, and was by me personally served on the within-named defendants, Charles Bates & Clark E. Bates, on the 11th day of Nov., 1879, by delivering to and leaving with each of them separate and true copies of the within.

Done within Minnehaha county, D. T.

HENRY CALLENDER,
Sheriff Minnehaha County, D. T.

Fees:

Service	60
Add. def'ts	50
Copy	50
Mileage	20
	$1 80

TERRITORY OF DAKOTA, } *ss.*
County of Minnehaha, }

In District Court, 4th Judicial District, within and for Minnehaha County.

CITY BANK OF MINNEAPOLIS, MINNESOTA, Pl'ff,

vs.

CHARLES BATES & CLARK E. BATES, Doing Business as C. Bates & Son, Def's.

The plaintiff in the above entitled action complains and alleges—

I. That it is now, and for some years prior to the date hereof has been, a corporation duly organized and existing under the laws of the State of Minnesota for the purpose of transacting a general banking business, and is doing business as such in its said corporate name.

II. That on the third day of June, A. D. 1879, at Minneapolis, Minnesota, said defendants made their promissory note in writing, whereby they promised to pay to the order of C. S. Philbrick and Company nine hundred thirty-one and 00-100 dollars; which note is in words and figures as follows, to-wit:

$931.00. MINNEAPOLIS, MINN., *June 3, 1879.*

Three months after date we promise to pay to the order of C. S. Philbrick & Co. nine hundred thirty-one & 00-100 dollars, at the City Bank, Minneapolis, value received, with interest at twelve per cent. per annum.

No. —. Due—. C. BATES & SON.

III. That the said C. S. Philbrick and Company endorsed the same to the plaintiff for value before maturity.

IV. That the defendants have not paid the same.

Second. For a second cause of action plaintiff alleges—

I. That on the 21st day of July, A. D. 1879, at Sioux Falls, D. T., said defendants, by their promissory note in writing made, promised to pay to the order of Merriman, Barrows and Company three thousand two hundred nine & 20-100 dollars ($3,209.20); which note is in words and figures as follows:

$3,209.20. SIOUX FALLS, D. T., *July 21, 1879.*

Three months after date we promise to pay to the order of Merriman, Barrows & Co. thirty-two hundred nine & 20-100 dollars, at the City Bank, Minneapolis, Minn., value received, with interest at the rate of 12 per cent. per annum until paid.

No. 9456. Due Oct. 24. C. BATES & SON.

II. That the said Merriman, Barrows & Company endorsed the same to the plaintiff before maturity and for value.

III. That the defendants have not paid the same.

Third. For a third cause of action plaintiff alleges—

I. That on the twenty-first day of August, A. D. 1879, at Sioux Falls, D. T., the defendants by their promissory note in writing made, promised to pay to the order of Merriman, Barrows and Company sixteen hundred dollars; which said note is in words and figures as follows, to-wit:

$1,600.00. SIOUX FALLS, D. T., *August 21, 1879.*

2 months after date we promise to pay to the order of Merriman, Barrows & Co. sixteen hundred 00-100 dollars, at Minneapolis, value received, with interest at the rate of 12 per cent.

No. 9532. Due 21-24 Oct. C. BATES & SON.

II. That the said Merriman, Barrows and Company endorsed the same to the plaintiff before maturity and for value.

III. That the defendants have not paid the same.

Fourth. For a fourth and further cause of action against said defendant, plaintiff alleges—

I. That on the sixth day of September, A. D. 1879, at Sioux Falls, D. T., the defendants, by their promissory note in writing made, promised to pay to the order of Merriman, Barrows and Company twenty-six hundred fourteen 65-100 dollars; which said note is in words and figures, as follows, to-wit:

$2,614.65. SIOUX FALLS, D. T., *Sept. 6, 1879.*

2 months after date we promise to pay to the order of Merriman, Barrows & Co. two thousand six hundred & fourteen 65-100 dollars, at Minneapolis, value received, with interest at the rate of 12 per cent.

No. 9600. Due Nov. 6-9. C. BATES & SON.

II. That the said Merriman, Barrows and Company endorsed the same to the plaintiff for value and before maturity.

III. That the defendants have not paid the same nor any part thereof.

Wherefore the plaintiff demands judgment against said defendant for the same—eight thousand three hundred fifty-four and 20-100 dollars—together with interest on $931.08 thereof from the 3d day of June, 1879, and interest on $3,209.08 thereof from the 2d day of July, A. D. 1879, and interest on $1,600 thereof from the 21st day of August, A. D. 1879, and interest on $2,614.65 thereof from the sixth day of September, A. D. 1879, besides the costs of this action.

R. J. WELLS,
Pl'ff's Att'y.

Warrant of Attachment.

TERRITORY OF DAKOTA,
Fourth Judicial District, } ss.

In the District Court in and for Minnehaha County.

CITY BANK, MINNEAPOLIS, MINNESOTA,

vs.

CHARLES BATES & CLARK E. BATES, Doing Business as C. Bates & Son.

The Territory of Dakota to the sheriff of the county of Minnehaha, Greeting:

Whereas, an application has been made to me for a warrant of attachment against the property of Charles Bates and Clark E. Bates, defendants, in an action in district court for said Minnehaha county, wherein The City Bank, Minneapolis, Minnesota, is plaintiff, and Charles Bates and Clark E. Bates are defendants;

And whereas the affidavit of Ruthven P. Thompson, the agent of said plaintiff, which has been presented to me on such application, states that a cause of action upon contract for the recovery of money exists against said defendants in favor of said plaintiff, and that the sum of eight thousand three hundred fifty-four & 20-100 dollars is due from the said defendants to the said plaintiff upon four several promissory notes, made and executed by the said defendants, which constitutes the plaintiff's demand against the defendants in said action, and that the said

defendants have assigned, disposed of, and secreted their property with intent to defraud their creditors, and are about to remove their property from the Territory with intent to defraud their creditors, and that plaintiff is entitled to said attachment, according to the provisions of article 4, chapter II, of the Code of Civil Procedure, and it having given the undertaking required by the provisions of the aforesaid chapter and article of said Code of Civil Procedure:

Now, you are hereby commanded and required to attach and safely keep all the property of said defendants —— ——, within your county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, above stated, together with costs and expenses, as security for the satisfaction of such judgment as said plaintiff may recover in said action, unless the defendants give you security, by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy said plaintiff's demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached, in which case you will take such undertaking; and when this warrant shall be fully executed or discharged you are required to return the same, with your proceedings thereon, to this court.

Witness the Hon. J. S. Kidder, judge of the district court in and for said Minnehaha county, and the seal of said court, this 10th of November, 1879.

[SEAL] CYRUS WALTS,
Clerk of Court.

Ex. 4.

The within warrant of attachment came to my hands Nov. 10th, 1879, and was by me served as follows, to-wit:

On the 11th day of the same month attached—

One old lumber wagon.

One yoke of oxen and yoke.

One set new harness.

Contents of 2 loaded wagons.

One lumber office and shed attached.

One hay-scale; one coal-shed and coal therein, situated on 10th St., Sioux Falls, D. T.

8 barrels and contents; one office book of accounts.

And on this 12th day of Nov., 1879, the following goods were by me attached, to-wit, one span sorrel mares, old wagon, harness, one dwelling house, as W. Mason's.

HENRY CALLENDER,
Sheriff Minnehaha County, D. T.

Ex. K., T. G. B.

TERRITORY OF DAKOTA, *Fourth Judicial District,* } *ss.*

In the District Court in and for Minnehaha County.
CITY BANK, MINNEAPOLIS, MINNESOTA, Pl'ff,

vs.

CHARLES BATES & CLARK E. BATES, Doing Business as C. Bates & Son.

TERRITORY OF DAKOTA, *Minnehaha County,* } *ss.*

Ruthven B. Thompson, being duly sworn, on oath says he is the agent of the plaintiff in the above-entitled action, and further says that Charles Bates and Clark E. Bates, the defendants in the above entitled action, are justly indebted to the City Bank, Minneapolis, Minnesota, in the sum of eight thousand three hundred & fifty four 20-100 dollars, and interest thereon —costs, over and above all discounts and set-offs, which said sum is now due; and that a cause of action exists therefor in favor of said plaintiff and against said defendants, amounting to the said sum of $8,354.20, the grounds of which are as follows: One promissory note for $931.08; one promissory note for $2,614.65; one promissory note for $1,600; one promissory note for $3,209.20; and that the defendants have assigned, disposed of, and secreted their property with intent to defraud their creditors, and are about to remove their property from the Territory of Dakota with intent to defraud their creditors.

That the defendant——

RUTHVEN B. THOMPSON.

Subscribed and sworn to before me this 10th day of November, 1879.

CYRUS WALTS, *Clerk.*

Ex. "K." T. G. B.

Exceptions to instructions to the jury.

The evidence being closed the defendant's counsel submitted to the court and asked the court to give the following requests or instructions to the jury, which were refused by the court, and to which the defendant duly excepted.

The instructions refused were as follows: (pgs. 63 and 64.)

Further, a dissolution of the partnership of C. Bates & Son and a division of the effects and moneys of the firm between the two members of the firm, Clark Bates and Charles Bates, would be, unless done with the consent of the firm creditors, void as against such creditors. No dissolution of any kind thus made can effect creditor's rights, and if the said parties assumed to divide up their property and then set up individual claims of exemption to the same, such claim cannot be maintained as against firm creditors, for the firm property or the proceeds thereof is just as liable for the joint debts after such a division as it was before.

II. Again, when the benefit of the exemption law is claimed by a partnership and the right asserted thereunder to have the $1,500 set off to the claimants, as by law provided, it is incumbent on the debtors to submit to an appraisement of all their partnership property, and this without reference to any division of the same made between themselves; and, after such appraisement made in the manner by law provided, it is their privilege to select, if over the limitation in value, the amount of fifteen hundred dollars in value, leaving the remainder subject to legal process; and, now, if the claimant debtors refused to have such appraisement, or if they kept back, detained, or concealed their personal property, or any part thereof, so that it could not be appraised, then they are not entitled to the benefit of the exemption law and their claim to the property taken on the writ of attachment by the officer my be disregarded. Refused.—J. P. Kidder, judge.

III. A debtor is insolvent, within the meaning of the law, when he is unable to pay his debts from his own means as they become due, and if it should appear to you from the evidence that the firm of Bates & Son were insolvent at the time of their

alleged dissolution of partnership, then they had no right to make such dissolution and any division of their partnership property thus made is void as against such creditors, and all such property must remain as partnership property, subject to the right of firm creditors, except that the partnership might claim one exemption of $1,500 in value out of said property; and if it should appear to you from the evidence that this plaintiff, as an individual, makes a claim of exemption in property which had been the property of Bates & Son, and was divided up by the partners just prior to the levy and seizure of the same by the sheriff on an attachment against the firm, then such claim cannot be maintained if said firm were insolvent as above stated. Refused.—J. P. Kidder, judge.

You are further instructed that if it should appear to you from the evidence that the firm of C. Bates & Son, a partnership, dissolved and divided up among themselves their partnership property and moneys, and at the time of such division were insolvent, then, as against the creditors of said firm, such dissolution and division of property was void, and the partners cannot from the property so divided maintain the right or claim of individual exemption to the amount of $1,500 each. The claim of exemptions, if any in said property, must have been a claim as a partnership, and the plaintiff cannot recover in this action. Refused.—J. P. Kidder, judge.

The court refused to give defendant's requests above, and to such refusal the defendant's counsel then and there duly excepted.

The case having been argued by counsel for the parties the court thereupon instructed the jury as follows: (pgs. 65, 66 and 67.)

GENTLEMEN OF THE JURY: This action was brought to recover damage for the wrongful conversion of certain personal property claimed by the plaintiff as exempt from sale on legal process, and the property is so claimed under that provision of our law which provides that a debtor may, in addition to certain enumerated articles deemed absolutely exempt, select from all other of his personal property, goods, chattels, merchandise,

money, or other personal property, not to exceed in the aggregate $1,500 in value. In order to give the debtor an opportunity to secure the benefit of this exemption the law requires that, in all cases of a levy upon personal property by a sheriff, he must give notice thereof to the debtor or to some one of the persons therein named for him, and the debtor must thereupon claim or demand the benefit of his exemption within three days after such notice from the office.

No form of demand on the part of the debtor is required, only it should be a clear and distinct claim or demand on his part for the benefit of his exemptions.

Upon a claim for property as exempt by limitation of value, as in this case, the same is required to be determined by an appraisement made under the directions of the officer, which appears to have been made in this case in substantial compliance with the statute.

From an appraisement so made under the provisions of this law, if over $1,500, the debtor may select and retain the amount in value of $1,500, leaving the remainder, if any, subject to legal process.

(The two requests by defendant are given.)

I. This is an action brought by the plaintiff to recover damages against Henry Callender, charging that said defendant, pretending to act as sheriff of Minnehaha county, forcibly seized and carried away certain personal property then belonging to the plaintiff under and by virtue of a certain writ of attachment issued out of this court wherein The City Bank of Minneapolis was plaintiff and this plaintiff and another, Charles Bates, were named as defendants, and the property so seized and carried away the plaintiff claims was his property and exempt from such attachment. Given.—J. P. Kidder, judge.

The defendant answers admitting the allegations of the plaintiff as to his official character, and justifies the alleged taking under the writ of attachment mentioned, asserting that the property seized under and by virtue of the writ was partnership property belonging to the firm of C. Bates & Son, and that the said firm, after having claimed the benefit of the exemption law on behalf of said partnership in and to said property, failed

and refused to submit to an appraisement of the whole of their personal property but detained and kept back a portion of the same from the appraisers chosen to make the appraisement.

II. Now, under the law of this Territory a partnership firm can claim one exemption of $1,500 in value and not a several exemption to each partner, or the alternative property so applicable, and if you should find from the evidence that the property, to recover the value of which suit is now brought, was at the time of the attachment levy partnership property of the firm of C. Bates & Son and was purchased with money of said firm, or that they claimed the same and offered to have or did have the same appraised as partnership property, then this plaintiff cannot recover in this action, and your verdict should be for the defendant. Given.—J. P. Kidder, judge.

Now, the plaintiff claims that he was the owner of the property mentioned in the complaint at the time it was taken, as his own individual property, and although some of it shortly before may have belonged to the copartnership of C. Bates & Son, yet the members of that firm, the court charges you for the purpose of this trial, had a legal right, upon a dissolution of the firm and a settlement between them, to divide and apportion their property and acquire each a specific portion thereof in severalty as his own separate property; and if you find from the evidence that the plaintiff did in fact acquire a portion of the property in question about October, 1879, from said firm, by agreement with his copartner, in consideration of certain other property retained by him out of the partnership property, and thereby became and was at the time of the levy the actual, *bona fide* owner thereof, then his ownership and title as to such portion cannot be impaired by the fact that it may have formerly belonged to said firm.

The written demand introduced in evidence in this case is sufficient in form under our law, and if you find from the evidence that this demand was about Nov. 11th, 1879, and within three days after the levy served upon the defendant on behalf of the plaintiff, then this would be considered a sufficient compliance with the statute in regard to his claim for the benefit of his exemptions.

As — the appraisement in this case it was properly taken in the suit in which the attachment was issued.

And the rights of this plaintiff to the property in question are not to be impared or affected by the fact that he was joined as a defendant with his late partner, Charles Bates, in the suit in favor of the City Bank, or by the further fact that the other property claimed by his co-defendant was included in the appraisement in that suit.

The court further instructs you that if you find from the evidence that the plaintiff was the owner of the property in question in this case at the time it was seized upon the attachment, and that on or about Nov. 11, 1879, and within three days after the levy, the plaintiff distinctly informed the defendant of his claim under the exemption law, and demanded the return of the property as exempt, and that an appraisement of such property was duly had under the direction of the defendant, in substantial compliance with the requirement of the statute, as explained to you, and that by such appraisement the value of the property so claimed by this plaintiff was found to be less than $1,500.00, then the plaintiff is entitled to recover in this action.

If you do not so find, your verdict should be for the defendant.

Upon the question of the value of the property in controversy the valuation contained in the appraisers' inventory is not to be regarded by you as the proper measure of damages, but its value should be determined by all the evidence given on this trial.

And in case you find for the plaintiff, in considering the amount of damages, you are instructed that this is an action, not upon contract, but for an alleged wrong, or tort, as it is termed in law, and in such an action the measure of damage is the amount which will compensate the plaintiff for all loss or harm proximately caused by the wrong, whether it could have been anticipated by the parties at the time or not. Under this rule the plaintiff is entitled, in the first place, to the value of the property at the time of the conversion, with interest at seven per cent. per annum from that time to the time of this trial, and

also a fair compensation for his time, properly expended, in pursuit of the property, as shown by the evidence; and further, under the rule above given, in case you find that the plaintiff sustained any damages by reason of having men and teams employed for carrying on his business, and that his business was broke up by the wrongful act or conduct of the defendant, then the plaintiff is also entitled to damages for all actual loss caused by the delay of men and teams and the breaking up of his business, and by being deprived of the means of carrying on the same, as shown by the evidence.

And it is a further provision of the law that in an action of this kind, if the defendant has been guilty of oppression or malice, actual or presumed, the jury may, in addition to all the actual damage, give damages for the sake of example, and by way of punishing the defendant for his wrongful conduct.

And, in this connection, if you find from the evidence that the defendant was satisfied it was his duty to return this property as exempt, and that he knowingly and wilfully refused to do so, whether of his own accord or instigated by others for whom he was acting, with the purpose and intent of vexing, annoying, harrassing, or oppressing the plaintiff, then, for such conduct in the matter, you may, in addition to all actual damages, give such damages, for the sake of example, as, in your discretion, may seem proper, not exceeding the amount of $1,500.00, claimed in the complaint.

J. P. KIDDER, *Judge.*

To the giving of which charge the defendant then and there duly excepted.

On November 16, 1882, the jury returned a verdict for the plaintiff assessing his damages at $1,500.

(P. 68.) On Nov. 20, 1882, within the time by statute allowed, the defendant served upon plaintiff's attorney notice of his intention to move for a new trial designating the grounds upon which the motion would be made; and subsequently, on the 22d day of Nov., 1882, the defendant filed his said motion for a new trial as follows:

TERRITORY OF DAKOTA, *Minnehaha County*:

In District Court.

CLARK E. BATES, Pl'ff, *vs.* HENRY CALLENDER, Def't.

To Messrs. Winsor and Swezey, pl'ff's att'ys:

Please take notice that the defendant herein intends to move the court to vacate and set aside the verdict rendered in the above cause, and to grant a new trial upon the following grounds:

First. The proof showed that the firm of Bates and Son claimed as exempt the property described in the complaint.

Second. The evidence showed that the alleged dissolution of co-partnership of Bates and Son was not a *bona fide* transaction, but was merely formal, without any actual change of possession of the property.

Third. The evidence did not show that any notice of the alleged dissolution was ever communicated to the creditor, the City Bank of Minneapolis.

Fourth. The evidence showed that Clark E. Bates was not, in fact, the owner of the said property in the complaint described.

Fifth. The evidence showed that the firm of Bates and Son agreed and submitted to an appraisement of said property as firm property, and, therefore, plaintiff was not entitled to recover in his individual capacity.

Sixth. Excessive damages, appearing to have been given under the influence of passion or prejudice.

II. Errors in law occurring at the trial and excepted to by defendant, viz:

(1.) The court erred in instructing the jury that although some of this property shortly before may have belonged to the co-partnership of C. Bates and Son, yet the members of that firm (the court charges you for the purpose of this trial) had a legal right, upon the dissolution of that firm and a settlement between them, to divide and apportion their property, and acquire each a specific portion thereof, in severalty, as his own separate property, and the court erred in giving the instruction next following, beginning with the words, "And if you find from the

evidence," and ending with the words, "belonged to said firm."

(3.) The court erred in giving the instruction beginning with the words "The written demand" and closing with the words "the benefit of his exemption."

(4.) The court erred in giving the instruction following, beginning with the words, "As to the appraisement" and ending with the words, "appraisement in that suit."

(5.) The court erred in giving the instruction following, beginning with the words "The court further instructs you that if you find" and ending with the words "entitled to recover in this action."

(6.) The court erred in giving the instruction commencing with the words "And in case you find for the plaintiff" and ending with the words "in pursuit of the property as shown by the evidence."

(7.) The court erred in giving the instruction beginning with the words "And further under the rule" and ending with the words "the same as shown by the evidence."

(8.) The court erred in giving the instruction commencing with the words "And it is further" and closing with the words "for his wrongful conduct."

(9.) The court erred in giving the instruction commencing as follows: "And in this connection" and ending with the words "claimed in the complaint."

(10.) The whole charge of the court as given tends to advise the jury that the plaintiff in this action had a right to claim as exempt the property in the complaint described and without reference to the proofs made, as to the same being partnership property of the firm of C. Bates and Son, and the same is misleading, as applied to the evidence in the case.

(11.) The court erred in giving the instruction commencing "Upon the question of the value" and ending with the words "on this trial."

(12.) The court erred in refusing to give the instructions and requests asked by defendant as the same are indicated and marked refused on the minutes of the court, viz., 3, 4, 5, and 6.

(13.) The court erred in refusing to submit to the jury the special findings No. 1 and 2 asked by the defendant.

(14.) The court erred in changing the verdict of the jury by striking out a portion thereof, to-wit, the words "and costs."

Said motion will be made upon the minutes of the court.

WILKES & WELLS,
Att'ys for Def't.

(P. 69.) The motion for a new trial having been presented, it was by the court overruled, and the defendant then duly excepted to such ruling.

(P. 70.) All the exceptions set forth in the foregoing abstract of the case are assigned as errors upon the appeal to the Supreme Court of the Territory, (p. 71.)

On that appeal the judgment of the District Court is affirmed, (p. 73.)

II.

ASSIGNMENT OF ERRORS. (P. —.)

In this court the errors assigned by the plaintiff in error, (defendant below,) and ruled upon, are in substance as follows:

First. The Supreme Court of the Territory of Dakota erred in affirming the action of the District Court in refusing to give defendant's request No. 1, as follows, to-wit, (p. 63,) and pp. 20-21 herein.

Second. The Supreme Court of the Territory of Dakota erred in affirming the action of the District Court in refusing to give defendant's request No. 2, (p. 64,) as follows, to-wit, pp. 20-21 herein.

Third. The Supreme Court of the Territory of Dakota erred in affirming the action of the District Court in refusing defendant's request No. 3, (p. 64,) as follows, to-wit, pp. 20-21 herein.

Fourth. The Supreme Court of the Territory of Dakota erred in affirming the action of the District Court in giving the instructions excepted to by defendant, (pp. 65, 66 and 67,) as follows, to-wit, see pp. 21-25 inc. herein.

Fifth. Said Supreme Court erred in affirming the ruling of the District Court in denying defendant's motion for a new trial, (p. 68.) Same set forth at length herein pp. 26-27.

Sixth. Said Supreme Court erred in affirming the judgment of the District Court.

Citations from the Dakota Code of Civil Procedure. Sections 322 to 333 inclusive, relating to exemptions, and the rights to be asserted thereunder:

EXEMPTIONS.

§ 322. EXEMPT FROM ALL PROCESS.] Except as hereinafter provided, the property mentioned under this heading, is exempt from attachment or mesne process, and from levy and sale on execution, and from any other final process issued from any court.

§ 323. ABSOLUTE EXEMPTIONS.] The property mentioned in this section is absolutely exempt from all such process, levy or sale:

1. All family pictures.

2. A pew or other sitting in any house of worship.

3. A lot or lots in any burial ground.

4. The family bible, and all school books used by the family, and all other books used as a part of the family library not exceeding in value one hundred dollars.

5. All wearing apparel and clothing of the debtor, and his family.

6. The provisions for the debtor, and his family, necessary for one year's supply, either provided or growing, or both, and fuel necessary for one year.

7. The homestead, as created, defined and limited by law.

§ 324. ADDITIONAL EXEMPTIONS.] In addition to the property mentioned in the preceding section, the debtor may, by himself or his agent, select from all other of his personal property, not absolutely exempt, goods, chattels, merchandise, money or other personal property, not to exceed in the aggregate fifteen hundred dollars in value, which is also exempt, and must be chosen and appraised as hereinafter provided.

§ 325. SPECIFIC ALTERNATIVE EXEMPTIONS.] Instead of the exemption granted in the preceding section the debtor may select and choose the following property, which shall then be exempt, namely:

1. All miscellaneous books and musical instruments for the use of the family, not exceeding five hundred dollars in value.

2. All household and kitchen furniture, including beds, bedsteads and bedding, used by the debtor, and his family, not exceeding five hundred dollars in value; and in case the debtor shall own more than five hundred dollars worth of such property, he must select therefrom such articles to the value of five hundred dollars, leaving the remainder subject to legal process.

3. Three cows, ten swine, one yoke of cattle and two horses or mules or two yoke of cattle, or two span of horses or mules, one hundred sheep and their lambs under six months old, and all wool of the same, and all cloth or yarn manufactured therefrom, the necessary food for the animals hereinbefore mentioned for one year, either provided or growing, or both, as the

debtor may choose; also one wagon, one sleigh, two plows, one harrow, and farming utensils, including tackle for teams, not exceeding three hundred dollars in value.

4. The tools and implements of any mechanic, whether a minor or of age, used and kept for the purpose of carrying on his trade or business, and in addition thereto, stock in trade not exceeding two hundred dollars in value. The library and instruments of any professional person, not exceeding six hundred dollars in value.

§ 326. THOSE BY NUMBER CHOSEN; BY VALUE APPRAISED.] All the articles enumerated in the preceding section which are exempt by limitation of number, must be chosen by the debtor, his agent or attorney; so, also, all property exempt by limitation of value must be determined by an appraisement made under the direction of the sheriff or other officer.

§ 327. APPRAISERS SELECTED.] To make the appraisement, the debtor, his agent or attorney must select one person, and the creditor, his agent or attorney, another person, and these two, so selected, a third person, who must all be disinterested citizens of the county not related to either party nearer than the fourth degree. If the two fail to agree upon the third person, the sheriff or other officer must select the third person; and, in like manner, if either the debtor or creditor fail or refuse, upon notice, to select a person to act as one of the appraisers, the sheriff or other officer must select one for them.

§ 328. OATH AND DUTIES OF APPRAISERS.] The three appraisers so selected, must take and subscribe an oath before the sheriff or other officer, to be attached to the inventory of appraisement, that they will truly, honestly, and impartially appraise the property of the debtor. The property must be appraised at the usual price of such articles at sheriff's sales, as near as can be determined, and must be set down in an inventory by articles or by lots when definitely descriptive, with the value opposite. From the appraisement so made, if over the limitation in value, the debtor, his agent or attorney, may select the amount in value of fifteen hundred dollars, or the alternative amounts in value, of each class, leaving the remainder, if any, in either case, subject to legal process.

§ 329. WIFE, OR CHILD OVER SIXTEEN, MAY ACT.] If, in any case, the debtor neglect or refuse, or for any cause, fail to claim the whole or any of the aforesaid exemptions, his wife is entitled to make such claim or demand, and to select and choose the property, to select and designate one of the appraisers, and to do all other acts necessary in the premises, the same and with like effect as the debtor himself might do; and if she neglect, refuse, or for any cause fail so to do, in whole or in part, then one of their children, of sixteen years of age and upwards, being a member of the family, may do so in like manner and with like effect.

§ 330. SHERIFF TO RETURN EXEMPTIONS.] The sheriff or other officer having any process of levy or sale, must make return with his writ or warrant, of any inventory and appraisement of any such exempted or other personal property.

§ 331. NOTICE BY SHERIFF TO DEBTOR—HIS CLAIM.] In all cases of a levy upon personal property by a sheriff, constable, or other officer, he must give notice therof to the debtor, his attorney, agent, or wife, or failing conveniently to find either, to such child as is described in section 329; and the debtor, or such other person for him, must claim or demand the benefit of these exemptions within three days after such notice from the officer; and said notice of levy may be by copy or by reading.

§ 332. LABORERS' OR MECHANICS' WAGES.] Nothing in this chapter shall be so construed as to exempt any personal property from execution for laborers' or mechanics' wages, except that absolutely exempt.

§ 333. PERSONS HAVING NO EXEMPTIONS—PARTNERSHIPS.] Except those made absolute, the exemptions herein provided for must not be construed to apply to the following persons, namely:

1. To a corporation for profit.
2. To a non-resident.
3. To a debtor who is in the act of removing with his family from the territory; or,
4. Who has absconded, taking with him his family.
5. A partnership firm can claim but one exemption of fifteen hundred dollars in value, or the alternative property, when so applicable, instead thereof, out of the partnership property, and not a several exemption for each partner.

III

BRIEF.

The first assignment of error is that the court erred in refusing to give instruction asked by—defendant—plaintiff in error, viz: That a dissolution of the partnership of Bates & Son, and a division of firm moneys and effects by the partners *inter se*, and a separate claim for exemptions as to existing firm creditors, out of what was firm property, was a transaction that was tainted with fraud, and consequently as to existing creditors of said firm void, and in considering these assignments of error we may for convenience include all the requests by (defendant) plaintiff in error, that were refused by the court.

"In a case when a co-partnership which is indebted has been dissolved, the retiring partner withdrawing, on transfer of his interests, a portion of the assets or capital, and the transaction being followed at a not remote period, by the insolvency of the member assuming the debts, and continuing the business, it is the duty of the court when called to consider the rights and liabilities of the parties to look cautiously into the facts, with a view to the discovery of any possible fraud, and the correction of any wrong that may have resulted to creditors."

In re Sauthoff & Olson, 8 Biss. p. 35.

The appropriation by an insolvent firm of partnership property to the payment of individual debts of one partner is not simply void but fraudulent.

Ib., p. 38.

Wilson vs. Robertson, 21, N. Y., 587.

Menagh vs. Whitewell, 52, N. Y., 146.

Osborn vs. McBride, 16, Nat. Bankruptcy, register, p 22.

That said firm was insolvent was not denied. See opinion of Kidder, J., p. 73, recd. and testimony of both partners, pp. 21, 22, 33 and 34, and herein pp. 8-13 inc.

This case is to be distinguished from Case vs. Beauregard, 94 U. S. 119. Fitzpatrick vs. Flanagan, 106, U. S. 648, and Huiskamp vs. Moline Wagon Co., 7, Supreme Court rept., p. 899,

in this: In all of these cases, the bonafides of the transaction is conceded and hence those cases do not apply in this case where the original transaction is surrounded with very suspicious circumstances, and this is followed at no distant date by the separate claim for exemptions, on behalf of the partners of said firm. What was the effect of this separate exemption claim? This, to withdraw from the creditors $3,000, instead of $1,500. Is it not the rule that a party must be held to answer for the legal effect of his acts, even if he did not contemplate them.

We contend therefore that the rule laid down in the foregoing cases cited does not apply in this case, but on the contrary, the following authorities upon this proposition are conclusive:

In re Sunthoff & Olson, 8 Biss. p. 35.

In re Cook & Gleason, 3, Biss. p. 122,

In re Croft Brothers, 8, Biss. 188.

Welsh vs. Kelly, 27, How. pr. 359.

In re Boothroyd vs. Gibbs, 14, Nat. Bankruptcy, register, p. 223.

Allen vs. Galloway, Fed. Rep. 30, pp. 468-69.

And "where the circumstances of the case show that the dissolution of the partnership is a fraud, as if it be an incident to a scheme * * to enable one member of a firm wrongfully to appropriate assets which should be applied in the payment of partnership debts or when the conversion of joint into separate assets is a result contemplated, and is the motive or one of the motives of the act dissolving the firm, the act may be avoided by the joint creditors." 8 Bissell, p. 39, 3, Biss. 127.

The fact that the laws of Dakota provide both for the individual and a partnership exemption, must go far to render a citation or examination of the decisions of other states of but minor importance in the case at bar. It is far from safe in adjudicating rights of exemption to rely upon the decision of the courts of other states in their construction of other exemption

laws. These laws being purely the creation of statutes, and having no existence at common law or in the general laws of the states we find there are nearly as many unlike and different exemption acts as there are different states of the union.

In the opinion of the court below it is to be noticed that great reliance is placed upon the case of Worman vs. Giddey, 30 Mich., as an authority, and a later case from that state, McCoy vs. Brennan, 28 NW. Rep., 129, goes yet farther than Worman vs. Giddey, and holds that upon a levy on partnership goods each partner may thereupon step forward and have a valid claim of exemption out of the stock. Says the court: "Everyone dealing with a firm has a right to know and is supposed to inquire who compose the firm." "Creditors give credit to the firm knowing each partner is entitled to an exemption in a mercantile firm and rate them accordingly." Now how manifestly out of place is such an authority when cited in the case at bar. Our statute says, a *several* exemption shall not be had out of partnership property. With an exemption law in Michigan like that of Dakota of course no such decision would have been recorded. Rather would it be said, creditors give credit to a firm knowing, that but ONE RIGHT OF EXEMPTION CAN BE TAKEN OUT OF PARTNERSHIP PROPERTY.

The same reasons we state as to why the Michigan cases are not to be considered as authority against us will apply with equal force to the case of Mortley vs. Flanagan, 38, Ohio St. 404.

Again, the court below says: "We come to the precise question in this case." Is it reasonable doctrine of the law that the mere dissolution of an insolvent firm and the division of its assets, accomplished without fraud, even though it be done for the purpose of securing to the members of the firm the benefit of individual exemptions, would amount to such a legal or constructive fraud as to deprive the debtors of such exemptions? (See record, pp. 77 and 78.)

And the court decides upon the authority of Worman vs. Giddey and other authorities at this point in the opinion cited, that such a dissolution of an insolvent firm and a division of its

assets with intent to claim several exemptions was a lawful right and wholly valid as against the firm creditors.

We maintain that such a conclusion by the court was wholly erroneous, and the court erred in refusing to give our last instructions marked refused. See page 64, record, and pages 20-21 herein.

We cite on this proposition:

Hoyt vs. Hoyt, 28, NW. Rep., 500.
Goodbar vs. Cary, 16, Fed. Rep., 317.
Short vs. Magruder, 22, Fed. Rep., 46.
Drake vs. Moore, 23, NW. Rep., 263.
Burtus vs. Tisdall, 4, Barbour, 571.
Menagh vs. Whitewell, 52, N. Y., 158.
In re Cook & Gleason, 3d Bissell, 122.
Roop vs. Herrow, 17, NW. Rep., 353.

In the foregoing cited cases while but a part of them as to the facts show suits to enforce exemption rights yet each and all maintain the proposition, that property of an insolvent firm should not be diverted to the use of individual partners when such diversion will have the effect to defraud the creditors of the firm.

If we now concede all that can be claimed for the proposition of a several exemption from partnership assets, as maintained in those states where no partnership exemption is provided for, we are yet by the facts of this case brought within the rule of these cited cases, for the identical property levied upon and sued for was in part the very property of the firm, and such as was not, the identical property was but just purchased with moneys of said partnership and the whole levy was made on the premises and at the place of business of the partnership of Bates & Son.

The demands for exemption are several and not on behalf of the firm, and this we contend makes fraudulent the conduct of this firm when the law says a partnership shall not have a

several exemption right out of the firm property. These creditors trusted this firm for this large amount of property, knowing that the law prohibited said firm from consuming $3,000, by two exemption claims.

The supreme court of Dakota, we say was all wrong when it said and applied the doctrine to this case, "that any acquisition or exchange of property into property which is exempt is entirely lawful," etc., for this property of Bates & Son was not thus exempt property, from the very moment the several members abrogated all rights as a firm to it and insisted on the division and a several exemption claim as against firm creditors.

With all due respect for the court rendering the opinion in this case (record, p. 73,) we claim that the court failed to discover the exact point decided in the several cases cited, the principle involved and the distinction to be recognized.

The case of Case vs. Beauregard, 99, U. S., 119, simply decides that copartners may divide their firm property, and hold it in severalty provided it is done by a *bona fide transfer*, thereby necessarily implying that if not bona fide it would be void. See Goodbar vs. Cary, 16, Federal Rept., p. 317.

If the transfer is fraudulent it is of course void.

In Day vs. Wetherby, 29, Wis., 363. The question is between creditors of an old and new firm, viz: "A conveyance by the members of the new firm, of real property thereof made in good faith to secure debts due from an old firm at its dissolution (said property having been mainly purchased with the funds of said old firm,) held valid as against the creditors of the new firm. This it will be seen does not even remotely approach this case.

In Atkins vs. Saxton, 77, N. Y., 195, cited in said opinion (p. 77, recd.) the question involved is, "A division of copartnership property between the partners, in proportion to their interests, for the purpose of protecting the property from seizure by the individual creditors of one the partners."